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In the Supreme Court

OF THE

United States

OCTOBER TERM 1981

TRUCKEE-CARSON IRRIGATION DISTRICT,
Petitioner,

vs.

UNITED STATES OF AMERICA and
PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I

Whether, in a comprehensive water rights adjudication, adversity of claims must appear on the face of the pleadings before the doctrine of res judicata/collateral estoppel can be asserted as a bar to relitigation of the same claims in subsequent actions.

II

Whether the Secretary of the Interior is authorized to negotiate and settle property disputes between Indians and non-Indians, or whether, instead, he must litigate them to final judgment.

PARTIES TO THE ACTION

This action involves more than seventeen thousand individual parties, including several thousand landowners who are represented by petitioner Truckee-Carson Irrigation District. These parties have been listed in a filing submitted to this Court by the State of Nevada, which filing accompanies its petition for certiorari in this case. Because preparation of a separate such list to accompany this petition would be burdensome, repetitious and impracticable, petitioner Truckee-Carson Irrigation District hereby adopts and incorporates herein the list of parties submitted by the State of Nevada.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 649 F.2d 1286. Subsequent to its publication, the decision was amended by order of the Court entered January 5, 1982. Both the decision and the order are reproduced in the Appendix (App., pp. 1, 66).

The decision of the District Court is embodied in its Memorandum Decision and its Findings of Fact and Conclusions of Law entered December 12, 1977. The District Court's decision was not published; it is reproduced in the Appendix (App., pp. 72, 94).

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was entered on June 15, 1981, and amended by its order of January 5, 1982. Petitions for rehearing were filed by defendant Truckee-Carson Irrigation District, petitioner herein; by plaintiff-intervenor Pyramid Lake Paiute Tribe of Indians; and by defendant-intervenor State of Nevada. All petitions for rehearing were denied by order of the Court of Appeals filed March 11, 1982. A petition for certiorari is therefore due June 9, 1982. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and Rule 17.1 of this Court.

STATUTORY PROVISIONS INVOLVED

One of the issues raised by this case concerns the extent the Secretary of the Interior's authority to manage federal property held in trust for the Indians. The following statutes are involved in that issue:

25 U.S.C. § 2:

> The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may

prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

25 U.S.C. § 9:

The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.

STATEMENT OF THE CASE

This case involves rights to the waters of the Truckee River, a major stream which originates in the Sierra Nevada mountains of California and Nevada. The Truckee flows out of Lake Tahoe through California for a distance, then through the arid Western Nevada desert past the cities of Reno and Sparks, finally terminating in a large saline desert lake known as Pyramid Lake, which has no outlet. Pyramid Lake is located in the Pyramid Lake Indian Reservation, a reservation which was established by executive order for the benefit of the Pyramid Lake Paiute Tribe of Indians (hereinafter referred to as 'the Tribe"). The waters of the Truckee River are used upstream from the reservation by the Sierra Pacific Power Company to generate electric energy, by the residents of Reno and Sparks for domestic and municipal purposes, by hundreds of irrigators on the Truckee River, and by several thousand farmers and their families on the 73,000 acre Newlands Project, a federal reclamation project, for irrigation, stock watering, and domestic purposes.

This litigation was commenced by the United States, on behalf of the Tribe, to assert a *Winters* doctrine reserved water right[1] to Truckee River flows sufficient to sustain

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[1]In *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207 (1908) this Court held that in establishing the Fort Belknap Indian Reservation, the federal government had impliedly reserved sufficient

a naturally spawning fishery in Pyramid Lake and the lower reaches of the river. For this right, the United States asserts a priority date of 1859, the earliest priority on the entire river. To establish this asserted right, the United States joined as defendants all of the other known diverters of Truckee River flows in Nevada, the State of Nevada, the Sierra Pacific Power Company, the Washoe County Water Conservation District, the Cities of Reno and Sparks, some 17,000 individuals, and the Truckee-Carson Irrigation District, petitioner herein (sometimes hereinafter referred to as "TCID" or "the District"). Because the District Court found that TCID could adequately represent the interests of the thousands of farmers on the Newlands Project, the United States was not required to name and serve them individually.

The defendants asserted that the United States was barred by res judicata/collateral estoppel from asserting this claim for additional water from the Truckee because of the final judgment entered in an earlier comprehensive adjudication of water rights in the Truckee River, *United States v. Orr Water Ditch Co.*, Equity No. A-3, in the United States District Court for the District of Nevada (hereinafter referred to as *"Orr Ditch"*).

The United States contended that because it had asserted the rights of both the Pyramid Lake Indian Reservation and the Newlands Reclamation Project in the *Orr Ditch* case, its representation of the Tribe had been inadequate, with the result that the United States was neither bound by the *Orr Ditch* Final Decree nor prohibited from asserting additional reserved water rights in this later separate action.

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rights to water from the river running through the reservation to accomplish the purposes of the reservation. Thus, water rights appurtenant to federal reservations are referred to as *"Winters* doctrine rights" or "reserved water rights."

The trial of this action was bifurcated. The first phase addressed the issue of whether the final judgment in *Orr Ditch* operated to raise the bar of res judicata/collateral estoppel against the United States' attempt to seek additional water for the Pyramid Lake Indian Reservation in this litigation. If the United States were not so barred, the second phase of the trial in this action would determine whether, and in what amount, a reserved water right for fishery purposes may be implied, under the *Winters* doctrine, for the Pyramid Lake Indian Reservation.

The District Court, after forty-one days of trial on the issue of preclusion, entered judgment against the plaintiffs and dismissed their complaint. It analyzed the historical facts concerning *Orr Ditch*, and found that the *Orr Ditch* Final Decree did bar the United States from asserting any new claims to Truckee River water.

The District Court made the following findings concerning the *Orr Ditch* litigation:

(a) The United States commenced the *Orr Ditch* litigation in order to obtain a final and comprehensive adjudication of all the water rights and claims on the Truckee River and its tributaries. In that litigation, the United States pursued two separate claims for water rights on the river: one for the Pyramid Lake Indian Reservation, with an 1859 priority (the most senior water right on the river); and one for the Newlands Project upstream, with a 1902 priority (the most junior water right on the river at that time) (App., pp. 99, 100).

(b) After a trial, the Special Master assigned to the *Orr Ditch* case proposed findings. Hearings on the proposed findings were held and a Temporary Restraining Order was entered, in 1926, to test the proposed decree before entry of final judgment (App. p. 101).

(c) Nine years later in 1935, a negotiated settlement, known as the Truckee River Agreement, was executed by the major water users on the stream. The parties to this agreement were the United States, Washoe County Water Conservation District, Sierra Pacific Power Company, the Truckee-Carson Irrigation District, and others.[2] The Truckee River Agreement proposed a physical solution to the problem of water distribution on the river. It provided that a final decree in the litigation based on its negotiated terms would be entered only after construction of an upstream storage facility, Boca Reservoir (App., pp. 102, 110).

(d) Congressional authorization of the reservoir was obtained and the Boca Reservoir was built. Thereafter, upon motion of all the signatories to the Truckee River Agreement, including the United States and TCID, the District Court held three days of hearings, and entered a final decree on September 8, 1944. The final decree incorporated the agreed-upon settlement of the water rights, including the water rights of the Pyramid Lake Reservation which were greater than those proposed by the Special Master. Under the decree the reservation's rights were increased in both acreage and water duty. However, the reservation's decreed right did not include flows specifically for the maintenance of a fishery. (App., pp. 102, 103, 110).

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[2]TCID was organized after the entry of the Temporary Restraining Order in 1926. Hence, at that time the United States represented the interests of the farmers within the Newlands Project. By the time settlement negotiations began, TCID had taken over operation of the Newlands Project, and represented the landowners' and water users' interests throughout those negotiations and in all subsequent court proceedings. Therefore, when the settlement was negotiated, the United States in fact represented only one interest, that of the Tribe.

(e) Finally, the *Orr Ditch* Final Decree permanently enjoined the parties to the litigation, and their successors, from ever asserting any right to additional waters from the Truckee River (App. pp. 185, 247). It was this decree that the District Court found created a res judicata bar and prohibited the assertion of any new reserved water rights after the water users in the region had relied on the finality of the previously adjudicated rights for nearly forty years.

In finding the above facts sufficient to warrant invocation of res judicata, the District Court addressed the issue of the federal government's inescapable duty to represent multiple and often inconsistent federal interests in litigation, and the authority of the executive branch to reconcile and choose between such interests. Congress was aware, the District Court held, of the inevitable clash between Indian interests and the interest of the government in opening and settling the West, and Congress has consciously given reclamation a higher priority. Thus, the District Court concluded, the Secretary of the Interior had been authorized to manage the *Orr Ditch* litigation as he had, with the result that any unasserted claims on behalf of the Pyramid Lake Reservation had been extinguished by the *Orr Ditch* Final Decree.

On appeal, the Ninth Circuit Court of Appeals upheld the District Court's dismissal as to every defendant *except TCID*. It expressly held that even subsequent appropriators who had not been parties to *Orr Ditch* but had reasonably relied on the finality of the *Orr Ditch* decree were entitled to rely on it, and could assert the bar of res judicata/collateral estoppel against the United States in this action.

As to TCID, however, the court held that because its interests, and, inferentially, the interests of the landown-

ers and water users within TCID's boundaries, had been represented by the United States in the prior action, TCID could not raise the defense of res judicata/collateral estoppel. The reasoning which the court offered for this conclusion was that a prior judgment does not preclude later litigation of the same matter between parties to the prior suit, if they were not "adversaries under the pleadings." Because the "requirement that adversity be explicitly established on the record, by pleadings" (App., p. 55) was not satisfied in the *Orr Ditch* case, the court said, the United States is free to relitigate the existence and amount of its water right for the Pyramid Lake Indian Reservation, *but only against TCID*, and only to the extent of the water rights decreed to the United States for the Newlands Project in the *Orr Ditch* Final Decree.

The Ninth Circuit also indicated, by way of footnote, that the Secretary of the Interior (hereinafter referred to as "the Secretary") has no authority under 25 U.S.C. § 2 or 25 U.S.C. § 9 to negotiate and compromise disputed property claims between Indians and non-Indians (see App., p. 29, n. 10). Therefore, even though the United States did not represent the Newlands Project farmers in the negotiation of the Truckee River Agreement, the Ninth Circuit held that the agreement was not a bar to the new litigation.

A. The special importance of this case

The Ninth Circuit's decision has significant potential for unsettling long-established rights throughout the arid West. As this Court has observed, Indian water rights in the Southwest are ubiquitous (*Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 811, 96 S.Ct. 1236, 1243 (1976)), and water, essential to life and livelihood, is perhaps the most critically scarce resource of the region (*Id.* at pp. 804, 1239). Furthermore, approximately half of all lands

in the Western United States are held by the United States (*United States v. New Mexico*, 438 U.S. 696, 699, n. 3, 98 S.Ct. 3012, 3013, n. 3). When disputes arise, therefore, particularly disputes over water rights, it is virtually impossible to avoid federal involvement and federal representation of multiple interests. Since independent representation of Indian tribes is a phenomenon of fairly recent vintage, it is a near certainty that many or most long-standing decrees and agreements involving Indian lands and other federal property were the result of unitary federal representation.

Because of these facts, the Ninth Circuit's ruling creates the very real possibility that numerous property rights which are federally derived will be subject to disruption solely on the bases that (a) at some point in the past, the government may have tried to avoid unnecessary litigation concerning Indian title, or, unavoidably, may have litigated multiple federal claims simultaneously; and (b) at some point in the future, a government official may decide that he disagrees with the claims made, strategy employed, or legal position taken by his predecessors.

The Ninth Circuit's decision merits consideration by this Court because it thwarts the clear congressional policy of encouraging comprehensive adjudication of water rights, including federal water rights; it encourages unnecessary litigation and relitigation of disputed claims; and it threatens wholesale disruption of long-standing property rights throughout the Western United States. The decision merits reversal because it does not comport with the facts of the case, it utterly disregards soundly established principles of trust law, and it directly contravenes this Court's development of the doctrine of res judicata/collateral estoppel and conflicts with decisions of five other Circuit Courts of Appeals.

BASIS FOR JURISDICTION BELOW

The jurisdiction of the District Court was based on 28 U.S.C. § 1345.

ARGUMENT

I

THE DECISION OF THE NINTH CIRCUIT SUBVERTS THE PRINCIPLES OF RES JUDICATA AND COLLATERAL ESTOPPEL ESTABLISHED BY THIS COURT

In *Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970, (1979), decided two terms ago, this Court summarized the principles of res judicata and collateral estoppel:

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies [citation]. . . ." Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. [Citations.] Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. [Citations.] Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. (440 U.S. at 153, 99 S.Ct. at 973.)

Montana v. United States, supra, is only the most recent of a decade-long line of cases commencing with *Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation*, 402 U.S. 313, 91 S.Ct. 1434 (1971), which evidence this

Court's commitment to the broadest possible application of the res judicata/collateral estoppel bar. This Court has progressively rejected the rigid technical constraints which, prior to *Blonder-Tongue*, had historically limited the application of res judicata and collateral estoppel.

Thus, in *Blonder-Tongue Laboratories v. University of Illinois, supra,* the Court rejected the mechanical application of the test of "mutuality of estoppel" as a requirement for collateral estoppel. In *Sea-Land Services Inc. v. Gaudet,* 414 U.S. 573, 94 S.Ct. 806 (1974) the Court applied the bar to non-parties who had been represented by a fiduciary in the prior action. In *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322, 99 S.Ct. 645 (1979) the Court held that even the "offensive" use of collateral estoppel was permissible. And most recently, in *Montana v. United States,* 440 U.S. 147, 99 S.Ct. 970 (1979), this Court again extended the doctrine, applying it to a plaintiff which had been neither a party nor represented by a party in the prior litigation but which, because of its off-the-record control of the litigation, had had a full opportunity to litigate its claim.

Only where prosecution of the prior action was confined by special, restrictive rules of evidence, procedure, and appeal not applicable to the subsequent action, has this Court refused to apply the res judicata/collateral estoppel bar (*See: Standefer v. United States,* 447 U.S. 10, 100 S.Ct. 1999 (1980); *but see: Allen v. McCurry,* 449 U.S. 90, 101 S.Ct. 411 (1980)).

It is plain that in the present action the United States seeks to assert the same claim, a *Winters* doctrine claim for a reserved water right for the Pyramid Lake Reservation, that it asserted in the comprehensive Truckee River adjudication which it commenced in 1913 and took to final judgment in 1944. The District Court held, and we agree, that a *Winters* doctrine right for a federal reservation

constitutes a single cause of action (App., p. 104). Under *Montana* and its predecessors, then, the United States is barred by res judicata/collateral estoppel from relitigating the same claim in this case.[3]

The functional approach which this Court's recent decisions have utilized toward the issue of preclusion serves a very beneficial purpose:

> [P]reclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions. (*Montana v. United States*, 440 U.S. 147, 153-154, 99 S.Ct. 970, 973-974 (1979).)

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[3]Even if the *Orr Ditch* judgment afforded only issue preclusion under the doctrine of collateral estoppel, rather than claim preclusion, the United States would be barred because the issues in this case are identical to those actually litigated in *Orr Ditch*.

The issues necessarily determined in the *Orr Ditch* case were (1) the existence of a *Winters* doctrine right for the reservation, (2) the date of priority of the right, and (3) the amount of the right.

The issue raised in this litigation is precisely that litigated in the prior action: The amount of water to which the Pyramid Lake Reservation is entitled by virtue of the 1879 executive order setting aside the Pyramid Lake Reservation for the benefit of the Indians. The same facts are controlling, namely, the date the reservation was established and the purpose for which it was established. And the same "bundle of legal principles" is involved, to wit, that the establishment of a federal reservation implies the reservation of sufficient water rights to fulfill its purposes (*Commissioner v. Sunnen*, 333 U.S. 591, 601-602, 68 S.Ct. 715, 721 (1948); *Montana v. United States*, 440 U.S. 147, 156, 99 S.Ct. 970, 975-976 (1979); *T. J. Starker v. United States*, 602 F.2d 1341 (9th Cir. 1979)).

This Court has also noted that these very considerations underlie the clear federal policy which encourages comprehensive adjudication of water rights in a single unified proceeding, such as the *Orr Ditch* case (*Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 819, 96 S.Ct. 1236, 1247 (1976)).

Recognizing the salutary purposes of the res judicata/collateral estoppel doctrine, the Ninth Circuit held that the defendants in *Orr Ditch* are entitled to rely on the finality of the judgment and may properly raise it as a preclusionary bar in this litigation. The court further held that, since the *Orr Ditch* litigation was, as the government had intended it to be, a "virtually comprehensive adjudication that approximated a statutory *in rem* proceeding, and avoided the defects associated with *in personam* water adjudications" (App., p. 49), it would be "manifestly unjust" *(id.)* to permit the *Orr Ditch* defendants to rely on the decree and not to permit subsequent appropriators to do the same.[4]

As to TCID alone, however, the Ninth Circuit held that because the adversity of the interests of the Newlands Project and the Pyramid Lake Reservation had not been "explicitly established, on the record, by pleadings" (App., p. 55) in the *Orr Ditch* case, the farmers on the Newlands Project who currently hold the rights decreed to the United States in *Orr Ditch* may not rely on the finality of that decree to protect their water rights (App., p. 55).

In so holding, the Ninth Circuit has taken a giant leap backwards from this Court's increasingly substantive application of the res judicata/collateral estoppel bar which limit litigants to one full and fair opportunity to litigate

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[4]In so holding, of necessity the Ninth Circuit impliedly found that the United States had been accorded a full, fair opportunity to litigate its claim, and thus that due process was afforded.

their claims. By imposing the hypertechnical limitation of "adversity on the pleadings" the Ninth Circuit has revitalized the archaic rule that form governs over substance. As a consequence, this Nation's already overburdened judicial system faces the prospect of still more unnecessary litigation and long-standing property rights which have been the basis of a major agricultural economy throughout Western Nevada and the seventeen Western states can no longer be relied upon.

The Ninth Circuit's requirement of "adversity on the pleadings" adds nothing to the due process safeguards already established by this Court. If a litigant has not had a full and fair opportunity to litigate his claim in an adversary context, the requirement of "adversity on the pleadings" will afford him no protection not already guaranteed by this Court's prior decisions. Conversely, if he *has* had such an opportunity, the "adversity on the pleadings" requirement will serve only to accord him an unwarranted second chance, and to inflict unnecessary expense on the defendants, burden on the judicial system, and uncertainty on long established property and financial interests.

II

THE DECISION BELOW CONFLICTS WITH DECISIONS OF FIVE OTHER CIRCUIT COURTS OF APPEALS

In addition to undermining the doctrine of res judicata/collateral estoppel developed by this Court over the past decade, the Ninth Circuit's requirement of formal "adversity on the pleadings" is directly at variance with decisions of the Third, Fourth, Fifth, Seventh, and Eighth Circuits. Since at least 1940 decisions in these five circuits have held that parties who were not so adverse could be barred in later litigation between themselves.

In *National Bondholders Corp. v. Seaboard C. Nat. Bank*, 110 F.2d 138 (4th Cir. 1940) a mortgagor refinanced his loan and attempted to discharge his preexisting debt by delivering funds to a third party. When the third party failed to deliver the funds to the trustee of the deed, the lender of the refinancing loan sued the mortgagor for repayment of that loan and also sued the trustee and the guarantor of the original loan to clear title to the trust deeded property. In the initial litigation the third party was found to be the agent of the original trustee, rather than the agent of the mortgagor, and the first promissory note obligation was held to have been properly discharged.

In a subsequent lawsuit the guarantor of the first promissory note sued the trustee thereof to recover the value of that note. The trustee again attempted to claim that the third party had not been its agent. The Fourth Circuit Court of Appeals applied the doctrine of res judicata/collateral estoppel against the trustee, despite its contention that the doctrine was inapplicable due to the lack of adversity between it and the guarantor in the first suit. On this issue the court held:

> . . . where some finding of fact is made in the first suit which is an essential element in a claim or action subsequently brought by one [co-party] against the other. . . . the judgment . . . is conclusive . . . in subsequent litigation between them. (110 F.2d 138, 144.)

Thus, the finding in the first suit of an agency relationship between the third party and the trustee was binding on the trustee in the later litigation, even though the trustee and the guarantor had not been adversaries, either on the pleadings, on the record, or in fact.

The Fifth Circuit followed *National Bondholders* in *Livesay Industries, Inc. v. Livesay Window Co.*, 202 F.2d 378 (5th Cir. 1953). There, the parties had been co-plain-

tiffs in an action against a third party to declare the validity of their then jointly held patent and to enjoin its infringement. Because the patent's validity had been an essential element in the prior action and had ben upheld, the Fifth Circuit held that the defendant could not challenge its validity in a second suit brought by its co-plaintiff in the earlier action.

The Seventh Circuit followed the same rule in *Diamond Shamrock Corp. v. Lumbermens Mutual Casualty Co.*, 416 F.2d 707 (7th Cir. 1969). Therein Diamond, a casualty sufferer, and Fireman's its fire insurer, sued Lumbermens, the underwriter of Diamond's general liability policy which covered risks other than fire. Lumbermens sought dismissal of Fireman's on the ground that, because of the lack of adversity between Fireman's and Diamond, Fireman's was not a proper party to the action since it would not be barred by the judgment in any later action between it and Diamond. In reversing the trial court's dismissal order, the Seventh Circuit held that:

> . . . It is likewise clear that the parties need not be arrayed as adversaries in the prior litigation and that formal issues need not be drawn between the parties to apply the doctrine [of collateral estoppel]. (416 F.2d at 710.)

The leading and most often cited case rejecting formal adversity on the pleadings as a requirement for res judicata/collateral estoppel is *Scooper-Dooper, Inc. v. Kraftco*, decided by the Court of Appeals for the Third Circuit in 1974 (494 F.2d 840 (3d Cir. 1974)). In an arbitration proceeding Kraftco had been ordered to cease and desist from violating a collective bargaining agreement wherein it had agreed not to market in the Metropolitan New York area products produced elsewhere. A federal district court later enforced the arbitration decision in a declaratory

judgment action brought by Kraftco and Scooper-Dooper challenging the collective bargaining agreement. The District Court upheld the agreement and ordered Kraftco to stop selling products produced in Philadelphia to Scooper-Dooper for resale in New York. Kraftco obeyed this order and was thereafter sued by Scooper-Dooper, which again challenged the validity of the collective bargaining agreement. In affirming the lower court's dismissal of the action on the basis of collateral estoppel, the court held that:

> . . . , [T]his Circuit's nullification of the mutuality requirement renders non-adversity irrelevant to the doctrine of collateral estoppel. In this Circuit, a total stranger to a prior litigation may, in a subsequent suit, estop a party from re-litigating a claim which he lost in the prior controversy, provided that the initial opportunity to present the claim was full and fair. We see no reason to treat a co-plaintiff more harshly than a total stranger. (494 F.2d 840, 845.)

Echoing the reasoning of the Third Circuit in *Scooper-Dooper*, the Eighth Circuit has also abandoned "the requirement of strict adversity", which it recognized as "the companion rule to 'mutuality'." (*Oldham v. Pritchett*, 599 F.2d 274 (8th Cir. 1979).)

The cases discussed above show the Circuit Courts' clear movement away from requirements of strict adversity in res judicata/collateral estoppel cases. Indeed, other than the Ninth Circuit's decision below, we have found no decision since this Court decided *Blonder-Tongue*, in which a circuit court has applied a test of "adversity on the pleadings" to prevent the application of res judicata/collateral estoppel. In this matter, the Ninth Circuit stands alone, and is so far from accepted principles of preclusion that this Court should exercise its jurisdiction to reaffirm its commitment to substance over form and to reiterate that

the sole test to be applied in these cases is whether the party to be barred had a full, fair opportunity to litigate its claim in the prior action.

III

THE DECISION OF THE NINTH CIRCUIT FRUSTRATES THE IMPORTANT FEDERAL POLICY OF PROMOTING CERTAINTY OF WATER RIGHTS

A. Western water right claims are comprised of two elements: priority date and amount of entitlement

In the arid Western United States, the right to water is generally acquired by applying it to a beneficial use. Because the supply of water is finite and frequently inadequate to meet all demands for its use, the doctrine of "prior appropriation" has developed, by which a priority is accorded each water user based upon the date his appropriation was initiated. He who is first in time is first in right to the use of the water. The amount of the water right is the amount the appropriator actually needs for his use, up to the maximum which was put to beneficial use within a reasonable time after the right was initiated. Subsequent, or "junior", appropriators can obtain rights only to water which is surplus to the needs of all prior appropriators. Thus, an upstream junior appropriator may not be entitled to divert water flowing past his diversion point if the flow is insufficient to satisfy the needs of all downstream appropriators with earlier priority dates.

Similarly, federal reserved rights are characterized by a priority and an amount of entitlement. They are different only in that (1) the priority is based on the date the federal reservation is established, rather than on the date water use is first initiated, and (2) the amount of the right is the amount reasonably necessary to fulfill the purposes for which the reservation was established, rather than the amount historically used.

Because of the inherently interdependent nature of water rights and the need for certainty of water supply in planning and pursuing virtually every human endeavor, comprehensive streamwide water right adjudications are a necessity. Indeed, as this Court has observed, Congress enacted the McCarran Amendment (66 Stat. 560, 43 U.S.C. § 666) in order to promote such adjudications in place of piecemeal and repetitive water right litigations attended by the potential for inconsistent decrees (*Colorado River Water Conserv. District v. United States*, 424 U.S. 800, 811, 96 S.Ct. 1236, 1247 (1976)).

B. The United States must assert multiple claims in comprehensive water right adjudications

The federal government itself needs reliability and certainty in its water rights as much as private citizens do. It must be able to evaluate the adequacy of those rights for its various purposes and to make long-range plans for the exercise of its governmental functions with certainty. To do this it must know with assurance what water rights it can rely upon and whether those rights will provide an adequate water supply for the purpose contemplated.[5] To obtain the necessary certainty, the government must adjudicate its water right claims in comprehensive water rights litigation.

Such litigation necessarily implies the simultaneous representation of multiple federal claims. As this Court has noted, water is perhaps the most critically scarce resource in the West and Southwest, and Indian water

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[5]For example, the availability of water rights was a critical consideration in the recent investigations of the feasibility of the MX missile program in Nevada (*Newsweek*, June 8, 1981, p. 40; "MX Missile Decision", *Cong. Quarterly*, June 5, 1981, p. 411). And the adequacy and availability of water rights is a prime factor in evaluating the feasibility of developing this Nation's coal and oil shale reserves.

rights are "ubiquitous" (*Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 804, 811, 96 S.Ct. 1236, 1247 (1976)). In addition to lands held in trust for Indian tribes, moreover, the federal government owns approximately half of all the lands in the western states (*United States v. New Mexico*, 438 U.S. 696, 699, n. 3, 98 S.Ct. 3012, 3013, n. 3). It holds these lands for purposes ranging from wildlife preservation to national defense, all of which require water for their fulfillment. The extent to which multiple water right claims must be simultaneously asserted by the federal government cannot be precisely determined, but even a cursory examination of recent cases illustrates that comprehensive water right adjudication is impossible to achieve without representation by the United States of multiple claims which must, by definition, conflict.[6]

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[6]In *Colorado River Water Conserv. District v. United States*, the United States initiated suit against some one thousand water users to assert reserved rights on its own behalf and on behalf of certain Indian tribes, as well as rights based on state law. The Court in *Colorado River* noted that the United States was also simultaneously pursuing multiple claims in adjudications in three other Colorado watersheds. (424 U.S. 800, 805, 806, 96 S.Ct. 1236, 1240 (1976)).

In *United States v. District Court, County of Eagle, Colorado*, water rights were asserted by the United States on behalf of the United States Forest Service, the Bureau of Reclamation, the National Park Service, the Bureau of Land Management, the Bureau of Mines, and the Bureau of Sport Fisheries and Wildlife. Potential future water needs of the Department of the Navy for development of its oil shale reserves were also noted by the Court (401 U.S. 520, 528, 529, 91 S.Ct. 998, 1004 (1971)).

In *Arizona v. California*, the United States asserted water claims on behalf of five Indian reservations in three states, National Forests, National Recreation and Wildlife areas "and other governmental lands and works" (373 U.S. 546, 595, 83 S.Ct. 1468, 1495 (1963)).

In *United States v. Alpine Land and Reservoir Co.*, 503 F.Supp. 877 (D. Nev. 1980), now pending before the Ninth Circuit Court

C. Requiring strict "pleading adversity" of claims would threaten privately held water rights on the Truckee River and throughout the West

Were only internal federal interests and priorities implicated in the decision below, this case might not cry out so compellingly for review by this Court. But federal action inevitably elicits private sector reliance.

A clear example of the interrelationship between governmental action and private sector reliance is the *Orr Ditch* case itself. It was precisely the need to ascertain water availability for the Newlands Project which impelled the government to seek adjudication of all prior water claims on the Truckee, including its own. (App., pp. 6, 100.) The Ninth Circuit's decision below, by postulating a fictitious non-adversity of water claims, has utterly destroyed the

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of Appeals, the United States purports to represent the water rights for the Toyiabe National Forest, Stillwater Wildlife Refuge, and the Newlands Project, but has advanced arguments based primarily on the interests of the Pyramid Lake Indian Reservation located in a different but related watershed.

Even in the case at bench, the United States is simultaneously pursuing claims on behalf of the Pyramid Lake Indian Reservation, the Stillwater Wildlife Refuge, the Toyiabe National Forest, and other federal purposes. (App., p. 16, 17.)

Whether the Ninth Circuit's decision would require separate and independent representation of each adversely pleaded federal claim is unclear. If not, nothing of substance would be accomplished by merely listing the claims separately and adversely on the pleadings. If so, an army of federal lawyers would be required for each water adjudication. Even then, however, it is highly questionable whether any additional quantum of "adversity" would be achieved. Each water right claim of the federal government is unique and has a unique identity composed of two elements: priority and amount. In any comprehensive water adjudication both elements are necessarily litigated in an adversary context by every other water right claimant with a later priority, since every prior right diminishes the water supply available to such claimants.

very certainty which it was the government's primary purpose in *Orr Ditch* to achieve. And, by stripping the Newlands Project of its water rights, the decision below jeopardizes the lives and investments of thousands of farm families who built an agrarian society at the invitation of the federal Reclamation Act and in reliance on the certainty of judicially established federal water rights.

By permitting reduction of the Newlands Project rights at this late date, the Ninth Circuit, in its decision below, sanctions invasion not only of rights still held by the United States, but also of rights now held by transferees of federal lands and water rights. Water rights on a reclamation project are appurtenant to the land (43 U.S.C. 372) and are owned by the individual project farmers (*Ickes v. Fox*, 300 U.S. 82, 95, 57 S.Ct. 412, 416-417 (1937)). It is these farmers' rights which the Ninth Circuit has held may now be retrieved by the United States, despite the fact that the District Court found that the farmers were unaware of any impropriety in the government's representation of the reservation. (App., pp. 103, 107).

The Newlands Project farmers paid valuable consideration for their water rights, by purchasing and improving the land, repaying the construction costs of the project, and detrimentally relying on the certainty of those rights for two generations. Retrieval of such rights at this point violates clearly established trust law principles which protect a purchaser's innocent reliance on a fiduciary's good faith dealings with his trust beneficiaries (See 4 *Scott on Trusts*, §§ 283-285, pp. 47-51 (1967)). A purchaser's innocent reliance is protected for the same policy reasons which underlie protection of a litigant's innocent reliance on a fiduciary's proper representation of his beneficiaries. No rational purpose is served by the Ninth Circuit's distinction between innocent purchasers and innocent litigants.

As this Court observed, the interlocking and interdependent nature of adjudicated water rights makes it inevitable that "'any order or action affecting one right affects all such rights.'" (*Colorado River Water Conserv. District v. United States*, 424 U.S. 800, 811, 96 S.Ct. 1236, 1243 (1976) quoting S. Rept. No. 755, 82d Cong. 1st Sess., pp. 4-5 (1951)). The Ninth Circuit transparently attempted to craft its decision in such a way that only the decreed rights of the Newlands Project could be invaded. But because of the interlocking nature of the rights involved, the court's attempt to insulate other water users from the impact of its decision is bound to fail.

The water rights decreed to the federal government in *Orr Ditch* are much greater than heretofore exercised by the Tribe and TCID, and junior appropriators are utilizing the excess until TCID and Indian demands build up to their maximum levels. Therefore, any future determination that the reservation is entitled to greater flows for its fishery will result in an expanded exercise of the government's *Orr Ditch* rights. Because the Truckee River is already fully appropriated during most of the year, correspondingly less water will be available for the junior appropriators. Thus the subsequent appropriators, whom the Ninth Circuit tried so pointedly to shelter from the impact of its decision, will inevitably be deprived of water nevertheless, as the *Orr Ditch* comprehensive decree is unraveled.

D. Factual adversity between claims is inherent in a comprehensive water right adjudication

This disruption of Western Nevada's water-based economy is unnecessary, and unsupported by either law or fact. A strict requirement of "adversity on the pleadings" has never reflected the realities of comprehensive stream-wide water right adjudications. In such actions, alignment

as plaintiff or defendant is irrelevant. Because the flow of water is finite, every claim is adverse to every other claim. As the Idaho Supreme Court explained, when addressing the issue of the adversity requirement:

> [I]t matters but little who are plaintiffs and who are defendants in the settlement of cases of this character; the real issue being who is first in right to the use of the waters in dispute. (*Morgan v. Udy*, 79 P.2d 295, 299 (Idaho 1938).)

If all claims in actions such as *Orr Ditch* are indeed adverse regardless of the parties' arrangement on the pleadings, one would expect to find in the record of *Orr Ditch* that both the priority and the amount of the water right claim asserted on behalf of the Pyramid Lake Reservation were in fact separately litigated in an adversary context between the government and non-governmental junior appropriators. In fact, the record shows this to have been the case. Throughout the litigation, and up to the entry of the final decree, the private defendants in *Orr Ditch* vigorously opposed both the priority date and the amount of water claimed by the government for the Pyramid Lake Reservation. (See Exhibits B-480, B-481, B-482, B-483, B-484, B-485, B-486, B-488, B-489, B-490, B-491, B-515.)

Thus, in *Orr Ditch*, as in every comprehensive water adjudication, the requisite adversity was established inherently by the nature of the claims made, rather than by the identity of the claimants or their arrangement on the pleadings. Factual adversity *of claims* is inherently and sharply present, was present in *Orr Ditch*, and is sufficient (*Chicago, R.I.&P. Ry. Co. v. Schendel*, 270 U.S. 611, 46 S.Ct. 420 (1926)).

The strong federal policies of encouraging comprehensive water right adjudications (*Colorado River Water*

Conserv. Dist. v. United States, 424 U.S. 800, 96 S.Ct. 1236 (1976)), obtaining finality of judgments in property rights litigation (*United States v. Title Insurance and Trust Co.,* 265 U.S. 472, 44 S.Ct. 621 (1924)), and promoting judicial economy while protecting due process rights (*Montana v. United States,* 440 U.S. 147, 99 S.Ct. 970 (1979)), will be severely undermined if the Ninth Circuit's decision is allowed to stand.

IV

THE NINTH CIRCUIT MISAPPLIES THIS COURT'S RULINGS IN HOLDING THAT THE SECRETARY OF THE INTERIOR WAS NOT AUTHORIZED TO NEGOTIATE AND EXECUTE AN OUT OF COURT SETTLEMENT OF DISPUTED INDIAN WATER RIGHTS

The *Orr Ditch* Final Decree, which TCID asserts as a preclusionary bar to the instant litigation, was a consent decree. It incorporated verbatim the provisions of the Truckee River Agreement settling the water rights of the various parties to the *Orr Ditch* litigation. (App. 102, 159-160, 231-233, 245.) The Truckee River Agreement was executed by the United States, TCID, and other major water users after extended negotiations during which TCID was independently represented. The Reclamation Service took no position, and the United States actively negotiated only on behalf of the Indians. In fact, the United States succeeded in obtaining agreement that the Pyramid Lake Reservation water right could be based on more reservation lands and a higher applied water duty than had been previously determined by the Special Master. (See Exhibits B-291, U-273, U-277, A-467, G-29, B-316, U-293, U-294, U-296, B-332, B-337, B-339, B-345, B-349.)

Because the Truckee River Agreement has vitality independent of the force of the *Orr Ditch* Final Decree, the

Ninth Circuit found it necessary to separately disable it. In footnote 10 of its decision, the Ninth Circuit states:

> 10. The district court did not rest its holding directly on 25 U.S.C. §§ 2 and 9. However, the defendants urge that two cases interpreting those sections, *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988, 77 S.Ct. 386, 1 L.Ed.2d 367 (1957) (*Ahtanum I*), and 330 F.2d 897 (9th Cir. 1964), *cert. denied*, 381 U.S. 924, 85 S.Ct. 1558, 14 L.Ed.2d 683 (1965) (*Ahtanum II*), provide alternative authority for the Secretary to extinguish Indian waters.
>
> Even if we agreed that the *Ahtanum* cases could be extended by analogy to this case, those cases have been modified by *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962), which was decided after *Ahtanum I* and before *Ahtanum II*. Under *Kake*, agreements between the government and non-Indians to alienate Indian property can only be valid if they are needed "to implement specific laws" other than 25 U.S.C. §§ 2 and 9. To be valid, then, the Secretary's conduct in *Orr Ditch* must find its basic authority elsewhere. (App., p. 29, n. 10)

In *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321 (9th Cir. 1956), the Ninth Circuit squarely held that the Secretary of the Interior had authority, under statutes empowering him to manage Indian affairs and all matters arising out of Indian relations (25 U.S.C. §§ 2, 9), to effect an out of court settlement of disputed Indian property rights. Ahtanum Creek bordered a treaty reservation and disputes arose between non-Indian settlers and the Indians as to the proper apportionment of the waters of the creek. In 1906, a non-Indian filed suit against a government agent concerning distribution of the creek's waters. As a result

of the litigation the Superintendent of Indian Affairs was "directed to see if an adjustment of the rights to use of the water could be made out of court" (236 F.2d at 329). In 1908, such an agreement was signed by the United States providing for twenty-five percent of the creek's flow to be allocated to the Indians and seventy-five percent to their non-Indian neighbors.

Thereafter the United States sued the non-Indian diverters of Ahtanum Creek for an adjudication of the Indians' water rights. The District Court dismissed the complaint, holding that the prior agreement barred the United States from claiming more than the twenty-five percent of the flow which had been guaranteed the Indians. The Ninth Circuit was faced squarely with the precise question it faces again in the instant litigation: Was the Secretary authorized to enter into such an out of court settlement? The Court held that he was, and found the agreement valid. It cited 25 U.S.C. § 2 and reasoned:

> It is fair to say that in conferring these powers upon the Secretary of the Interior Congress must have had it in mind that a part of the Secretary's task of supervision and of management of Indian affairs would necessarily deal with certain relations between the Indians on the one hand and their white neighbors on the other. The management of any parcel of land necessarily involves some degree of occasional adjustment of the rights of the owner in relation to and concerning adjoining landowners; arrangements for the location and erection of boundary fences, and repair and maintenance of those fences are illustrations of this. More specifically we have here the case of a stream which formed the boundary between the Indian reservation and the outside public lands, and which public lands were open to entry by white settlers.

> The rights of the white settlers to the use of the waters were subordinate to the rights of the Indians, but they were not nonexistent. . . . Where the waters of a stream are subject to use by different landowners, the very use itself involves some accommodation between the parties. It is common knowledge that, particularly in the early days, many streams in the West were used by appropriators or by riparian owners long before the stream rights had been adjudicated, and prior to the establishment of any machinery for the appointment of water masters. That sort of thing involves a measure of dealing between water users. Authority to manage property would normally comprehend dealings of this character.
>
> At the time the 1908 agreement was made, disputes had begun to appear as to the proper division and distribution of the waters of Ahtanum Creek. Of course it was then open to the United States, although not to the white landowners, to start court proceedings designed to adjudicate the rights of the litigants. It is the view of this court that it could not have been within the contemplation of Congress that the Secretary, vested as he was with the general power of supervision and management of Indian affairs, and of matters arising out of Indian relations, could not make a peaceful arrangement for a practical mode of use of the waters of this stream. (236 F.2d at 335, 336.)

Under the holding of *Ahtanum*, the Truckee River Agreement is clearly valid and binding on the United States, regardless of the effect of the *Orr Ditch* Final Decree. The Ninth Circuit now repudiates its *Ahtanum* holding, but does so by completely misinterpreting this Court's decision in *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S.Ct. 562 (1962). According to the Ninth

Circuit, *Kake* holds that Secretarial action is valid under 25 U.S.C. § 2 and § 9 only if necessary to implement other specific laws. Since no specific statute can be pointed to which expressly empowers the Secretary to compromise disputes involving Indian trust lands, the court reasons, the Secretary is not authorized to do so.

This interpretation of *Kake* is nothing short of amazing. *Kake* had nothing to do with management authority over trust property. It involved the interrelationship between State and federal *jurisdiction* over Indian activities.

In *Kake*, the issue was whether the Secretary had the authority to permit Indians to operate fish traps in navigable waters in contravention of State conservation laws. This Court held that Congress had neither granted the Indians immunity from State conservation laws while fishing on non-reservation lands, nor authorized the Secretary to do so.

In the discussion of this dispute over State jurisdiction, the Court referred to arguments made by the Secretary based on 25 U.S.C. §§ 2 and 9:

> In keeping with the policy of almost total tribal self-government prevailing when these statutes were passed, see 369 U.S., pp. 71-72, 82 S.Ct., p. 569, infra, the Interior Department itself is of the opinion that the sole authority conferred by the first of these [25 U.S.C. § 2] is that to implement specific laws, and by the second [25 U.S.C. § 9] that over relations between the United States and the Indians—not a general power to make rules governing Indian conduct. United States Department of the Interior, Federal Indian Law (1958), pp. 54-55; Cohen, Handbook of Federal Indian Law (1945), p. 102. We agree that they do not support the fish-trap regulations.
>
> (369 U.S. at 63, 82 S.Ct. at 564)

It is this language which the Ninth Circuit has transformed into a holding governing the management of Indian trust property. But such a far-reaching extension of *Kake* would strip the Secretary of authority to deal with and manage that property at all. Non-judicial dispute resolution is a necessary part of property management and of Indian relations. Adjustment of disputed rights is not the equivalent of "alienation" of Indian property, as the Ninth Circuit suggests. (App., p. 29, n. 10.) Where rights are uncertain and disputed, and mutual agreement can be reached, the adjustment may amount, as readily as not, to "acquisition" as to "alienation." Finally, where mutually acceptable arrangements can be made settling property disputes and providing a foundation for future neighborly relations between Indians and non-Indians, no reason appears why scarce judicial, financial, and human resources must be expended before the dispute can be effectively resolved.

The Ninth Circuit's opinion curtailing the scope of the Secretary's management powers unsettles, to an unknowable degree, established property interests which have been relied upon for generations. Because of this impact, and because it drastically limits the executive's management authority to deal with trust property in the future, this Court should accept this case to more fully describe the management authority vested in the Secretary of the Interior. Only with such clarification can the effectiveness of the Secretary's decisions be relied upon in future years and the validity of property interests founded upon his actions in past years be ascertained.

V

CONCLUSION

As shown by the foregoing discussion, the decision of the Ninth Circuit Court of Appeals in this case contradicts the principles of res judicata/collateral estoppel developed by this Court, directly conflicts with decisions of at least five other Circuit Courts of Appeals, and threatens the livelihood of thousands of reclamation project farmers and holders of other federally derived rights throughout the seventeen Western United States. The decision also misapplies a prior decision of this Court and so far extends it that it destroys the Secretary of the Interior's power to avoid unnecessary litigation through negotiated compromises of disputed rights in Indian trust property. As a result of the decision below, settled property interests throughout the West are needlessly exposed to disruption and challenge.

Because these reasons are special and important, petitioner respectfully requests that a writ of certiorari issue from this Court as prayed.

Dated: June 9, 1982.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM 1981

TRUCKEE-CARSON IRRIGATION DISTRICT,
Petitioner,

VS.

UNITED STATES OF AMERICA and
PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Appendix A

United States of America,
Plaintiff-Appellant,

and

Pyramid Lake Paiute Tribe of Indians,
Plaintiff-Intervenor-Appellant,

v.

Truckee-Carson Irrigation District, State of Nevada,
Sierra Pacific Power Company, City of Reno,
City of Sparks, County of Washoe, and
Washoe County Treasurer, Trustee, Albert A. Alcorn
and Approximately 17,000 Other Individually
Named Persons, Firms, Partnerships, and Corporations,
Defendants-Appellees.

Nos. 78-1115, 78-1493.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 15, 1980.

Decided June 15, 1981.

As Modified July 10, 1981.

• • • •

Before TUTTLE,** SKOPIL, and SCHROEDER, Circuit Judges.

SKOPIL, Circuit Judge:

**Senior Circuit Judge, U. S. Court of Appeals, Fifth Circuit, sitting by designation.

This action is brought by the United States and the Pyramid Lake Paiute Tribe to quiet title to a water right to sustain the Pyramid Lake fishery. The question raised in this appeal is whether an equitable water adjudication filed by the government in 1913 and finalized in 1944 precludes this cause of action.

In 1913 the United States filed in the U.S. District Court in Nevada an equitable action, *United States v. Orr Water Ditch Co., et al.*, Equity No. 3, naming as defendants virtually all water users on the Truckee River in Nevada. The government sought a decree quieting title to the water rights of all users of Truckee River water. As plaintiff, the government purported to represent two interests: the Newlands Reclamation Project, which required an appropriation of water for irrigation purposes; and the Pyramid Lake Indian Reservation, which was alleged to have a federally reserved water right. The proceedings terminated in 1944 with the filing of a final decree. The Reclamation Project's water right has enabled it to divert most of the flow of the Truckee River before it reaches Pyramid Lake. The Reservation's water rights were limited to a small quantity of irrigation water. The government did not assert a claim for water to sustain the Pyramid Lake fishery.

In 1973 the United States instituted this action on behalf of the Pyramid Lake Paiute Tribe. The complaint sought a decree quieting title to a reserved water right to fulfill the purposes of the Pyramid Lake Reservation, including the maintenance of the level of Pyramid Lake and the lower reaches of the Truckee River for fishery purposes.

In 1974 the Tribe intervened as a party plaintiff, asserting the same right.

After an extensive trial, the district court held that the 1944 final decree in the *Orr Ditch* case precluded the cause of action asserted here. The district court dismissed the government's claim for a reserved water right for the Reservation for fishery purposes. The district court dismissed the Tribe's complaint in intervention in its entirety.

We affirm that portion of the district court's order giving preclusive effect to the *Orr Ditch* decree as to most of the defendants. We reverse that portion of the order dismissing the complaint as to the Truckee-Carson Irrigation District.

FACTS AND PROCEDURAL HISTORY

1. *The Pyramid Lake Reservation*

In 1844 John C. Fremont came across Pyramid Lake and the Indians inhabiting its shores. The Lake was "set like a gem in the mountains" and "broke upon [their] eyes like an ocean". It was about 50 miles long and 12 miles wide, considerably larger than its sister, Lake Tahoe. The Indians brought in fish to trade with the whites. The fish

> "were of extraordinary size—about as large as the Columbia River Salmon—generally from two to four feet in length . . . they doubtless formed the subsistence of these people, who hold the fishery in exclusive possession . . . ."

The Expeditions of John Charles Fremont 609 (1970).

In 1859 the Secretary of the Interior directed that a 322,000 acre reservation be set aside, consisting of Pyramid Lake ("the Lake"), the lands surrounding it, and the lower reaches of the Truckee River, which feeds the Lake. In

1874 President Grant signed an executive order confirming the reservation. As the district court found, one of the purposes of establishing the reservation was to enable the Tribe to take advantage of the Pyramid Lake fishery, then consisting of a native species of cut-throat trout, and the cui-ui which exist nowhere else. Under the supervision of the Department of Interior's Indian Service, the Indians began irrigating reservation land. By 1890, about 1,000 acres were irrigated. This had increased to 1,200 acres in 1913.

2. *The Reclamation Project*

In 1902 Congress passed the Reclamation Act, permitting the Secretary to withdraw from entry arid public lands and to initiate irrigation projects to reclaim them. Fifteen days after the Act was passed, the Secretary withdrew land for what became known as the Newlands Reclamation Project ("the Project") in western Nevada. The Project contemplated the irrigation of about 200,000 acres. It was designed to draw water from two rivers, the Carson and the Truckee, which originate in the Sierra Nevada Mountains. In its natural state, the Carson River, after reaching the Nevada desert, is lost in a vast sink. The Truckee runs from the Sierra Nevadas to Lake Tahoe, spills into eastern California, then into Nevada, and ends in Pyramid Lake. The Project would divert water from the Truckee River into the Lahontan Reservoir on the Carson River, which lies outside the Truckee River watershed. There the water would be stored for Project use. Many miles of irrigation works would transport the water to reclamation sites.

After land was withdrawn for the Project, the government posted notices claiming the right to all unappropriated water in the Truckee, and making a specific claim to the use of 1,500 cubic feet of water per second. Construction then began on Derby Dam, and on a large canal to divert water from the Truckee into the Lahontan Reservoir.

In 1904 Congress authorized the Secretary to include within the Project irrigable land located on the Pyramid Lake Reservation ("the Reservation"). A portion of that land was to be allotted to the Indians in 5-acre allotments. About 20,000 reservation acres were thought to be irrigable. Because there were relatively few Indians on the reservation, a large land surplus was anticipated. These surplus irrigable lands were to be sold to settlers, the proceeds to be used for the Indians' benefit.

3. *The Orr Ditch Proceeding*

Prior to the Project's initiation, a number of private landowners, land and water companies, and power generating companies had established rights in the Truckee. There were about 40,000 irrigated acres in the Reno Valley alone, owned by about 100 separate parties. Much of the water being diverted in the Reno Valley was being wastefully used, and there was "no practical way for the government to confine this very extensive up-river use within proper bounds." Further, the Pyramid Lake Reservation was believed to have a reserved water right with a very early priority date under the *Winters* doctrine. *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908), *aff'g*, 143 F. 740 (9th Cir. 1906). Only after water rights

were adjudicated could the government know how much water it could divert. In times of scarcity the government could enforce restrictions on other users.

Nevada law offered a cheap and expeditious method for adjudicating water rights, under the auspices of the State Engineer. However, because the government expected to assert "difficult and intricate legal" theories, it was thought better to bring an equitable quiet title action in federal court. On August 21, 1912, the Attorney General authorized a suit to be initiated. The complaint in *United States v. Orr Water Ditch Co., et al.* was filed on March 3, 1913. The complaint asserted a claim to 10,000 cubic feet of water per second for the Project, and 500 cubic feet per second for the Reservation. The complaint sought to name as defendants all water users on the Truckee River in Nevada. It prayed for a decree quieting title to the rights of all parties.

With respect to the claim for the Reservation, the complaint was drafted broadly to permit the government to assert "the fullest sort of reserved rights for this reservation." John F. Truesdell, the Special Assistant U.S. Attorney who drafted the complaint, recognized that the Reservation rights were uncertain. At the very least, the Reservation was entitled to an appropriation right based on the Indians' historic use, even assuming the *Winters* reserved rights doctrine did not apply to executive order reservations. If a *Winters* right was available, its extent was uncertain. The reservation might be entitled to sufficient water for all irrigable Reservation acreage. Alternatively,

> "[i]t might be held that the reservation of waters was limited to the fullest amount of water that could be used by the Indians for which the reservation was made and their reasonable increase, when living on allotments such as it has been the custom of the government to make . . . ."

Ex. U-10 at 8. The circumstances surrounding the establishment of the Reservation "would have an important bearing upon this question." Truesdell came to the conclusion that *Winters* rights ought to exist for executive order reservations, under the reasoning of *Conrad Investment Co. v. United States*, 161 F. 829 (9th Cir. 1908), *aff'g*, 156 F. 123 (C.C.D.Mont.1907). It was essential to include them in the adjudication: "[T]hese Indian reservation water rights are important and should be established to the fullest extent because they are senior and superior to most if not all the other rights on the river."

After filing the complaint, the government initiated extensive surveys of the land and ditches of all claimants. Much of this work was done by government agents, and some by engineers employed by the defendants. The parties shared the survey information. It was more than six years after the complaint was filed that the case reached an evidentiary hearing. During that time, the government's claims for the Reservation took shape. The 1904 Act (authorizing 5-acre Indian allotments, and sale of surplus irrigable land) was a dominant consideration. Two general categories of reservation lands were thought to be irrigable: about 19,000 acres of bench lands, and about 2,400 acres of "delta" or bottom lands lying along the Truckee. The 2,400 acres of bottom lands were already "to a very

considerable extent being farmed by the Indians and they also embrace the agency and school property." Under the authority of the 1904 Act, the Reclamation Service planned to include in the Project the 19,000 acres of bench lands. Under the 1904 Act it was

> "of course clear that each Indian belonging on the reservation is to have five acres of this land. It also seems clear that under the doctrine of the Winters case the original Indian withdrawn water right would attach to each of these five acres that the Indians are to have, but the rest of the 19,000 acres which will be irrigated by the works of the project will have to depend for their water right upon the general project water right."

Ex. U-88 at 2.

The claim was discussed with officials in the Indian Service. The government decided to press a claim for water sufficient to irrigate about 5,400 acres: 3,000 acres of bench lands (to account for 600 5-acre allotments) and 2,400 acres of delta lands. With minor changes, this was the claim asserted at the evidentiary hearing and in the government's post-hearing briefs.

Truesdell saw no conflict between the needs of the Reservation and the needs of the Project:

> "[W]e have always had it in mind that there could be no conflict of interest between the Reclamation project and the Indian Reservation as to the irrigation of these 2,400 acres of delta lands, because these lands are the last on the river and we have thought that return flow from irrigation below the headgate of the single canal that serves all of the Reclamation Project lands would be ample to irrigate these Indian lands

> so that never would the Reclamation Project have to refrain from diverting water in order to satisfy the Indians' earlier priority."

Id. at 4.

The evidentiary hearing, conducted mainly by a Special Master, began in 1919 and lasted until 1921. Arguments were heard in September 1922. In July 1924, the Special Master issued his report and proposed decree. He agreed that there should be no conflict between the water needs of the Reservation's "meager" allotments and the needs of other users.

The Master recommended that a temporary restraining order be entered declaring the parties' water rights for a trial period. District Judge Farrington accepted the report and on February 13, 1926, signed a temporary restraining order. The order awarded the Reservation an 1859 priority date for water for 3,130 acres of delta or bottom lands. If 5-acre allotments of bench lands were made under the 1904 Act, the reservation would be entitled to additional water for those lands. For the Project, the government was to have a 1902 priority date for 1,500 cubic feet per second flow for the irrigation of 232,800 acres.[1]

On December 18, 1926, the government and the Truckee-Carson Irrigation District (TCID) signed a contract under which the latter was to operate the Project.

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[1]It was recognized, notwithstanding this priority, that there would be insufficient water to irrigate the Project's entire 232,800 acres. In fact, there has never been irrigated more than about 65,000 acres of land in the Project.

4. *The Decline of the Fishery*

Pyramid Lake's fishery continued to be productive through the first part of the century. Around the time of the *Orr Ditch* evidentiary hearing, however, the Project's diversion of "almost the whole volume of the Truckee River" into another watershed, began to tell. The level of the Lake began to drop. This, in combination with refuse from upstream sawmills, built up a delta at the mouth of the Truckee. In 1921 Lorenzo Creel, a Special Supervisor in the Indian Service, had to arrange a special spill of water from Derby Dam to enable the Lake's trout to pass the delta. Without the additional water, the fish were unable to reach their upstream spawning grounds.

In 1922 Creel pronounced the fishery "doomed" unless an adequate flow of water could be assured. In January 1922, feeling that the fishery's needs had been overlooked, Creel suggested to the Commissioner of Indian Affairs and to Reno Agency officials that water for the fishery could be sought in the *Orr Ditch* case:

> "I have accumulated a great deal of material for this report, and in studying over the situation it is clear that the intent of the government, when the Pyramid Lake reservation was established, was to include Pyramid Lake for the use and benefit of the Paiute Indians. The only benefit to be derived therefrom apparently is the Pyramid Lake trout.
>
> "Now, if this view be the correct one, have not the Indians a prior right to sufficient water from the Truckee River to enable those trout to reach their natural spawning beds, in order that they may reproduce themselves? This question is so vital that I wish

> to recommend that it be taken up at once; and probably Mr. Truesdell and Mr. Withers, who are defending the right of the Indians to water for irrigation purposes, may so amend their brief on behalf of the Indians that this additional water right may be claimed for them, and thus save a separate action, with more prompt results."

Ex. U-101 at 3.

If the Project's requirements were deemed "paramount to the value of the lake to the Indians", Creel suggested that the Indians should be awarded compensation. Supervisor Wilson, in charge of the Indian Service's Reno Agency, echoed Creel's suggestion in correspondence to the Acting Commissioner of Indian Affairs. The Acting Commissioner responded that his office was

> "disposed to do everything it can to protect the fish, not only for the benefit of the Indians, but of the white population as well, so far as consistent with the larger interests involved in the proposition, having to do with the reclamation of thousands of acres of arid and now useless land for the benefit of the country as a whole."

Ex. U-113 at 2-3.

Members of the Tribe and others continued to point out the need for water for the fishery. The government's responses varied. In January 1925 a delegation of tribal members met with the Indian Service Agency Supervisor in Reno. The Supervisor sent a copy of minutes of the meeting to the Commissioner of Indian Affairs. A response came from the Commissioner of Reclamation, saying that his Bureau would "carefully guard against taking any ac-

tion which would impair the right of the Indians" to water for fishing. In the same year, Representative Raker of California wrote to the Attorney General asking about the status of the *Orr Ditch* case. The Assistant Attorney General in turn wrote Ethelbert Ward, the attorney then handling the case, stating his understanding that the fishing rights of the Indians were not involved in the *Orr Ditch* litigation, but asking confirmation.

> "[Congressman Raker] seems particularly interested in that aspect of the suit connected with the Pyramid Lake Indian Reservation and the rights of the Indians, and also in the preservation of the Truckee River as a fishing stream. Apparently some action is contemplated looking to legislation requiring installation of means for facilitating the passing of fish over the dams, etc. He inquired especially whether the adjudication suit involved any questions, or has brought out any information, concerning the fishing rights of the Indians. I assume, of course, that nothing of the kind is involved, but would like a direct statement from you concerning it."

Ex. U-23. Ward replied:

> "You will see from the bill of complaint that nothing is said about fish or water to be used for fish passing up and down the stream. Nothing appeared about this subject in any pleadings, nor was any testimony taken or any suggestions made from the beginning of the case down to the present time regarding fish.
>
> "Inasmuch as the Government has control of the Derby Dam, I have always thought that the Reclamation Service and the Indian Service, both bureaus of the Department of the Interior, could settle the matter between them as to providing the proper fishways and

> the comparatively small amount of water which may be needed to enable the fish to pass up the fishways."

Ex. U-24. Congressman Richards of Nevada also wrote to the Commissioner of Indian Affairs. Commissioner Burke responded:

> "We fully realize the value and importance of the fish, not only to the Indians but also to the people of that section of the country generally and will do everything that is possible for the preservation of this industry so far as is in our jurisdiction and within the limitation imposed by available funds.

Ex. U-152. In 1926 the Commissioner of Indian Affairs advised the Indians to resign themselves to the loss of water for the fishery, which would "be used practically as far as it can be for irrigation."

A severe drought (1929-34), combined with the Project's diversions, and other factors, pushed the fishery further toward extinction. In a 1935 letter to the Commissioner of Indian Affairs, Reno Agency Indian Service officials described the

> "tragic situation which results from the drying up of the Truckee River through diversion of practically all of its water for irrigation purposes. You have assured us and our own understanding of the situation persuades us against our will that it will be practically impossible at this late date to obtain any assured flow of water from the Truckee River into the Lake. The time for that was when the original Truckee River water rights were being adjudicated."

Ex. A-506.

Between 1920 and 1938, the level of the Lake dropped some 40 feet; its surface area was reduced by about 20,000

acres. By the early 1940's the strain of cut-throat trout indigenous to the Lake was extinct. The cui-ui just survived. Beginning in 1941 efforts began to restore the fishery with a dam and fishway. In the later 1940's Nevada began stocking the Lake. The success of this effort led to the enactment in 1956 of the Washoe Project Act. Section 4 of that Act declared that "restoration of the Pyramid Lake trout fishery to its full potential value is deemed to be of national interest and importance". Several Lahontan cutthroat trout hatcheries now augment the Lake's fishery. A small, experimental cui-ui hatchery is operating on the Reservation. In 1976 the Marble Bluff Dam and Fishway were completed, enabling the fish to bypass the delta in transit to their spawning grounds. Releases from Stampede Reservoir, completed in 1970, have helped provide flows needed for the fishway. See *Pyramid Lake Tribe v. Morton*, 354 F.Supp. 252 (D.D.C.1973).

As the district court in the instant case observed, these restoration efforts "appear to justify optimism for eventual success." Nevertheless, the level of the lake has continued to drop since 1940. The cui-ui is classified under federal law as an "endangered species", the Lahontan cutthroat as a "threatened species", under 15 C.F.R. § 17.11 at 87-88 (1977).

5. *The Truckee River Agreement and the Final Orr Ditch Decree*

In the mid-1930's the principal organizational defendants in the *Orr Ditch* case (Washoe County Water Conservation District, and the Sierra Pacific Power Co.) and TCID, proposed an agreement among all parties. The proposed

agreement conformed to the temporary *Orr Ditch* decree. The parties proposed to stipulate to a final decree, contingent on the construction of additional upstream storage at Boca Reservoir.

Ethelbert Ward raised an objection. The temporary decree assumed that only about 3,000 acres of the 19,000 acres of irrigable reservation bench lands would be in Indian ownership. This was based on the assumption that the 1904 Act, authorizing 5-acre Indian allotments and sale of the surplus would be carried out. On May 9, 1934 Ward noted that Congress was considering the Wheeler-Howard Bill, which would prohibit further allotments. The Pyramid Lake Reservation lands had never been allotted, and it now appeared they never would be. Accordingly, Ward suggested that the government seek a reserved right for all 19,000 acres of irrigable Reservation bench lands. The Bureau of Indian Affairs looked into this possibility but rejected it because of its "doubtful feasibility from all standpoints, including that of water supply. . . ." Several other features of the proposed agreement were debated within the Interior Department. The Department negotiated an increased duty of water for acreage included in the Reservation claims. The Reservation's claim was limited to 3,130 acres of bottom land and 2,745 acres of bench land. The agreement was signed on July 1, 1935. A stipulation for entry of a final decree was executed one and one-half years later. In April 1942, after completion of Boca Reservoir, the *Orr Ditch* decree was filed. In September 1944, hearings on entry of the final decree were held. The decree was entered on September 8, 1944. No appeal was filed. Since it was entered, the decree has been enforced only twice: in 1949 and in 1969.

6. *Proceedings Following the Orr Ditch Case*

In 1951, pursuant to the Indian Claims Commission Act, 25 U.S.C. § 70 *et seq.*, the Tribe sued the government for damage to the fishery. In 1973 the Commission found the government liable. *Northern Paiute Tribe v. United States*, 30 Ind.Cl.Comm. 210 (1973). In 1975 the Claims Commission approved a compromise settlement of $8,000,000 in the Tribe's favor "on its claim for damages suffered as the result of its not having received all of the water to which it was entitled under rights reserved for the Pyramid Lake Indian Reservation". *Pyramid Lake Paiute Tribe v. United States*, 36 Ind.Cl.Comm. 256 (1975). The parties stipulated their belief that the Tribe's water rights themselves were undiminished, and the award of damages did not represent compensation for "the loss, diminution, or taking of any water rights." *Id.* at 259-60.

This action was filed by the government on December 21, 1973. The complaint purported not to "dispute the rights decreed" in the *Orr Ditch* action but only to secure "additional rights" for the United States and the Tribe, with priority dates superior to those of the defendants. The government named as defendants not only those whose rights stemmed from the *Orr Ditch* decree but also those whose rights to Truckee River water originated elsewhere. The State of Nevada was named as a defendant in its proprietary capacity, in its governmental capacity as the issuer of permits to appropriate unappropriated waters, and as *parens patriae* for its citizens.

The complaint alleged a reserved water right for the Reservation for fishery purposes, with an 1859 priority

date. The government also sought water for the Stillwater Wildlife Refuge, designated in 1948; the Toiyabe National Forest, set aside in 1905, 1909, and 1926; and other purposes.

Many of the 17,000 defendants raised, as an affirmative defense, the preclusive effect of the *Orr Ditch* decree. The plaintiffs sought to avoid preclusion on equitable grounds and on the ground that in the *Orr Ditch* case the government plaintiff had an impermissible conflict of interest. The plaintiffs maintained that precluding litigation of the Reservation's fishery water right would deprive the Tribe of due process of law. In February 1975 the district court bifurcated the trial to consider the res judicata issue separately from all other issues. The trial on this issue commenced on November 17, 1975 and continued intermittently through May 20, 1976. Briefs were submitted and final argument heard on October 1977. The district court held that the *Orr Ditch* decree was res judicata and dismissed the government's claim to the reserved water right for the Reservation for fishery purposes. The district court dismissed the Tribe's complaint in intervention in its entirety.

The district court held that the cause of action asserted here was part of the same cause of action asserted in *Orr Ditch*. The plaintiffs were both held to be in privity with the plaintiff in *Orr Ditch* and all defendents here in privity with the *Orr Ditch* defendants. As to the government's conflict of interest in *Orr Ditch*, the court found as follows:

> "That by the enactment of the Reclamation Acts of 1902 and 1904, which declared a national policy of reclamation of the arid lands of the West, and the implementation thereof by the Department of the Interior

by the construction and establishment of the Newlands Reclamation Project, there was a foreseeable conflict of purposes created by the Congress within the Interior Department and as between the Bureau of Reclamation on the one hand in asserting large water rights for its reclamation projects and the Bureau of Indian Affairs on the other in the performance of its obligations to protect the rights and interests of the Indians on the Pyramid Lake Paiute Indian Reservation. That this conflict of purposes was apparent prior to and during the *Orr Ditch* proceedings and was resolved within the executive department of government by top-level executive officers acting within the scope of their Congressionally-delegated duties and authority and were political and policy decisions of those officials charged with that responsibility, which decisions resulted in the extinguishment of the alleged fishery purposes water right.

"The government lawyers in *Orr Ditch*, both departmental, agency and bureaus, as well as those charged with the responsibility for the actual conduct of the litigation, are not chargeable with an impermissible conflict of purpose or interest in carrying out the decisions and directions of their superiors in the executive department of government and the Tribe has not suffered any deprivation or denial of due process of law by reason thereof which may be asserted or applied in this case to diminish or defeat the rights of the defendants acquired by the adjudication and the final decree in *Orr Ditch*. The good faith or motives of said government counsel is not questioned by plaintiff and the Tribe in this proceeding."[2]

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[2]We note that the district court did not find that executive officials intentionally extinguished the fishery claim but only that their decisions resulted in extinguishment.

The court also found that since 1944, Congress, the executive branch, and the courts have recognized the government's actions in *Orr Ditch*, confirmed them, and "recompensed the Tribe" for any loss.

The plaintiffs contended below that a water right for fishery purposes could be implemented in such a way that any harm to the defendants would be small. The district court held that it was the plaintiffs' burden to prove this contention, and that the burden was not met.

ISSUES

The issues presented by this appeal fall into four general categories:

I. Those issues relating to the government's authority in bringing the *Orr Ditch* suit:

A. Did Congress authorize the Secretary of the Interior to extinguish the Reservation water rights? Under this heading we discuss the Reclamation Act of 1902 and the 1904 Appropriations Act.

B. Did Congress authorize the Secretary to seek a judicial decree quantifying federally-reserved water rights?

II. Those issues relating to the specific elements of the res judicata defense:

A. Is the cause of action asserted here part of the same cause of action asserted in *Orr Ditch*?

B. What parties may rely on the *Orr Ditch* decree?

1. Orr Ditch defendants.

2. Truckee-Carson Irrigation District.

III. Congressional actions since 1944 said to ratify the *Orr Ditch* decree.

IV. Finally, we discuss briefly several arguments which the trial court either rejected or did not consider controlling.

We apply the "clearly erroneous" standard to the district court's findings of fact. However, in several instances, conclusions listed by the district court as "findings of fact" include legal conclusions. This is true of the district court's findings concerning the nature of the government's conflict (quoted at 1295-1296 *supra*). We are not bound by the legal conclusions or the mixed findings of law and fact. *See Bogardus v. Commissioner*, 302 U.S. 34, 58 S.Ct. 61, 82 L.Ed. 32 (1937); *United States v. One Twin Engine Beech Airplane*, 533 F.2d 1106 (9th Cir. 1976); *Official Creditors Comm'n v. Ely*, 337 F.2d 461, 467 (9th Cir. 1964), *cert. denied*, 380 U.S. 978, 85 S.Ct. 1342, 14 L.Ed.2d 272 (1965); *Weible v. United States*, 244 F.2d 158 (9th Cir. 1957); *FTC v. Texaco, Inc.*, 555 F.2d 862, 876 n. 29 (D.C. Cir. 1977), *cert. denied*, 431 U.S. 974, 97 S.Ct. 2940, 53 L.Ed.2d 1072 (1977); *Cordovan Assoc. v. Dayton Rubber Co.* 290 F.2d 858, 861 (6th Cir. 1961). Accordingly, we have independently reviewed the evidence to assess these findings.

DISCUSSION

I. Authority for the *Orr Ditch* Proceedings.

A. Did Congress authorize the Secretary of the Interior to extinguish the Reservation water rights?

The district court found that the 1902 Reclamation Act, which provided general authority for reclamation projects

and the 1904 Appropriations Act, which provided specific authority to reclaim and dispose of Pyramid Lake Reservation lands, demonstrated Congress's intent to subordinate the Tribe's property to reclamation projects. It relied heavily on a 1915 Supreme Court decision, *Henkel v. United States*, 237 U.S. 43, 35 S.Ct. 536, 59 L.Ed. 831 (1915), for its interpretation of the Reclamation Act. We first address the authority conferred by the 1902 Reclamation Act.

1. The Reclamation Act of 1902.

The Reclamation Act of 1902 confers on the Secretary broad condemnation authority.[3] The district court found

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[3]Relevant sections of the Reclamation Act are as follows:

"Sec. 7. That where, in carrying out the provisions of this act, it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney-General of the United States upon every application of the Secretary of the Interior, under this act, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice.

"Sec. 8. That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in the irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: PROVIDED, That the right to the use of water acquired under the provisions of

that this impliedly authorized the Secretary to acquire any property needed for reclamation projects, whether the owner of the property was an Indian tribe or a private owner. The court held that the Reclamation Act created a conflict between the need to develop reclamation projects and the responsibility to protect Indian property. By directing the Secretary to develop reclamation projects, and authorizing him to use the condemnation power, Congress authorized the Secretary to use the broadest possible discretion in acquiring property. This necessarily included the power to extinguish Indian water rights. The trial court found the Secretary did this in the course of the *Orr Ditch* litigation. We reject this analysis.

The Reclamation Act in itself conferred no water rights. It provided means for acquiring water rights, but only under state law. It is now settled that except when inconsistent with "clear congressional directives" respecting a reclamation project, section 8 of the Reclamation Act requires the Secretary to comply with state law in acquiring water rights. *California v. United States*, 438 U.S. 645, 665-66, 671 n. 24, 98 S.Ct. 2985, 2996, 2999 n. 24, 57 L.Ed.2d 1018 (1978).[4]

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this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right.

* * * * * *

"Sec. 10. That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect."

Act of June 17, 1902, 32 Stat. 389, codified at 43 U.S.C. §§ 421, 383.

[4]We find no merit to defendant Nevada's suggestion that *California v. United States, supra,* announces a new principle of law that should not be given retroactive effect. *See Ivanhoe Irr. Dist. v.*

Nor does the Reclamation Act confer authority to acquire additional water for a reclamation project by extinguishing federal water rights reserved for other purposes. "[T]he Secretary of the Interior could not take any action in appropriating the waters of the state streams 'which could not be undertaken by an individua' or corporation if it were in the position of the Government as regards the ownership of its lands.'" *California v. United States, supra,* 438 U.S. at 665, 98 S.Ct. at 2996 (quoting from HR Rep.No. 794, 57th Cong., 1st Sess. 7-8 (1902)). Federal reserved rights cannot be acquired or extinguished under state water laws. *FPC v. Oregon,* 349 U.S. 435, 444, 75 S.Ct. 832, 838, 99 L.Ed. 1215 (1955); *United States v. Cappaert,* 508 F.2d 313, 320 (9th Cir. 1974), *aff'd,* 426 U.S. 128, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976); *and see Minnesota v. United States,* 305 U.S. 382, 386-87, 59 S.Ct. 292, 294, 83 L.Ed. 235 (1939). Accordingly, federally reserved water rights, such as those appurtenant to the Pyramid Lake reservation, could not be acquired under the Reclamation Act.

McCracken, 357 U.S. 275, 291, 78 S.Ct. 1174, 1183, 2 L.Ed.2d 1313 (1958).

The defendant's authorities tend to establish the paramount authority conferred by the Reclamation Act to acquire property needed for reclamation projects. However, those cases concern acquisitions of non-federal property. *United States v. Buffalo Pitts Co.,* 234 U.S. 228, 34 S.Ct. 840, 58 L.Ed. 1290 (1914); *Dugan v. Rank,* 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963); *United States v. Gerlach Live Stock Co.,* 339 U.S. 725, 70 S.Ct. 955, 94 L.Ed. 1231 (1950); *City of Fresno v. California,* 372 U.S. 627, 83 S.Ct. 996, 10 L.Ed.2d 28 (1963); *Turner v. Kings River Conservation Dist.,* 360 F.2d 184 (9th Cir. 1966) (Flood Control Act of 1944); *United States v. Carmack,* 329 U.S. 230, 67 S.Ct. 252, 91 L.Ed. 209 (1946) (Public Buildings Act).

This conclusion is also backed by sound policy. Under the *Winters* doctrine, when the federal government reserves land for federal purposes, it impliedly reserves sufficient water to serve those purposes. We cannot suppose that reservations made for non-reclamation purposes were impliedly supplanted by the reclamation program. We do not say that Congress cannot abolish federal reservations, but we must hesitate to infer this, absent the clearest legislative directive.

This consideration applies *a fortiori* when Indian water rights are involved. An intent to extinguish Indian property rights is "not to be lightly imputed to Congress." *Menominee Tribe v. United States,* 391 U.S. 404, 413, 88 S.Ct. 1705, 1711, 20 L.Ed.2d 697 (1968). Such a drastic result requires "a clear expression of congressional intent." *United States v. Winnebago Tribe,* 542 F.2d 1002, 1005 (8th Cir. 1976). Executive order reservations such as the Pyramid Lake reservation merit "the same protection as the Indian title to reservations created by treaty or statute." *United States v. Southern Pacific Transportation Co.,* 543 F.2d 676, 686 (9th Cir. 1976). Ambiguities in statutes are resolved in favor of the Indians. *United States v. Santa Fe Pacific R.R.,* 314 U.S. 339, 354, 62 S.Ct. 248, 255, 86 L.Ed. 260 (1941). Thus, a general statute, such as the Reclamation Act, is not interpreted to authorize the extinguishment of Indian property, absent a clear showing of congressional intent. *Leavenworth, Lawrence, & Galveston R.R. v. United States,* 92 U.S. 733, 742, 23 L.Ed. 634 (1876); *McCandless v. United States,* 25 F.2d 71 (3d Cir.

1928); *Confederated Tribes v. Alexander*, 440 F.Supp. 553 (D.Or.1977).[5]

Accordingly, we reject the defendants' suggestion that the Reclamation Act of 1902 conferred on the Secretary authority to extinguish the Pyramid Lake Tribe's water rights. Much less can we agree that the Act conferred authority to proceed to extinguish these rights in the "back-handed" manner suggested by the defendants. *Menominee Tribe v. United States, supra*, 391 U.S. at 412, 88 S.Ct. at 1710-1711. Even where the Secretary has acquired existing water rights under state law, he has typically provided some notice to the affected owner. *E. g., Dugan v. Rank*, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 70 S.Ct. 955, 94 L.Ed. 1231 (1950). We must assume that if Congress had intended to confer authority to extinguish Indian property rights, it would have provided for a more straightforward procedure. *See Waters and Water Rights, supra*, at 162 n.20.

The district court relied on *Henkel v. U.S., supra*, 237 U.S. 43, 35 S.Ct. 536, 59 L.Ed. 831, for its interpretation of the authority conferred by the 1902 Reclamation Act. *Henkel* held that the broad authority conferred by section 7

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[5] *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960), is not to the contrary. The land at issue there was held by Indians in fee and not by the government in trust. The broad condemnation authority conferred by the Federal Power Act, involved in *Tuscarora*, could be interpreted to apply to fee lands as well as any other non-trust lands. Here we are concerned with trust property, the title to which is held by the U.S. *See United States v. Winnebago Tribe, supra*, 542 F.2d at 1005; Getches, Rosenfelt, and Wilkinson, *Federal Indian Law* 201, 203 (1979).

of the Reclamation Act was intended to permit acquisition by purchase of Indian lands. The action sanctioned in *Henkel* was of an entirely different character than the action involved here. In *Henkel* the Indians involved received cash compensation, and were permitted to select other allotments in lieu of those taken. In short, *Henkel* involved a purchase, specifically authorized by section 7 of the Reclamation Act. Here, in contrast, the Secretary has never declared an intention to purchase, extinguish, or acquire the Tribe's water rights. No compensation was paid or even offered. Indeed, the government takes the position that acquisition was never intended. *Henkel's* broad dicta can have little independent force in this setting.

2. The 1904 Appropriations Act.

The district court held that section 26 of the 1904 Appropriations Act[6] specifically authorized the Secretary to

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[6]Section 26 of the 1904 Act provides:

"That in carrying out any irrigation enterprise which may be undertaken under the provisions of the Reclamation Act of June seventeenth, nineteen hundred and two, and which may make possible and provide for, in connection with the reclamation of other lands, the reclamation of all or any portion of the irrigable lands on the Pyramid Lake Indian Reservation, Nevada, the Secretary of the Interior is hereby authorized to reclaim, utilize, and dispose of any lands in said reservation which may be irrigable by such works in like manner as though the same were a part of the public domain: PROVIDED, That there shall be reserved for and allotted to each of the Indians belonging on the said reservation five acres of the irrigable lands. The remainder of the lands irrigable in said reservation shall be disposed of to settlers under the provisions of the Reclamation Act: PROVIDED, FURTHER, That there shall be added to the charges required to be paid under said Act by settlers upon the unallotted Indian lands such sum per acre as

commit portions of the Tribe's land to the Newlands project. We agree with this interpretation of section 26. We do not agree that section 26 authorized the Secretary to extinguish the Tribe's water rights in the *Orr Ditch* proceedings.

Section 26 was never implemented. No 5-acre allotments were ever made to Indians. No surplus land was disposed of. No Indian lands received irrigation water from the Newlands project. Even assuming that disposal of surplus reservation land would have reduced the Tribe's reserved water rights,[7] disposal under section 26 never occurred.[8]

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in the opinion of the Secretary of the Interior shall fairly represent the value of the unallotted lands in said reservation before reclamation, said sum to be paid in annual installments in the same manner as the charges under the Reclamation Act. Such additional sum per acre, when paid, shall be used to pay into the reclamation fund the charges for the reclamation of the said allotted lands, and the remainder thereof shall be placed to the credit of said Indians and shall be expended from time to time, under the direction of the Secretary of the Interior, for their benefit."

33 Stat. 189, 225 (1903-1905).

[7] *E.g.*, under the irrigable acreage approach to quantifying reserved water rights, *see Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963), a reduction in irrigable reservation land would imply a reduction in the quantity of the reserved water right.

[8] In 1904 the allotment policy dominated federal-Indian affairs. *See generally*, F. Cohen, *Handbook of Federal Indian Law* 217, *et seq.* (1942). In 1934 the Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. § 461 et seq., withdrew authority for further allotments. *See Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 479, 96 S.Ct. 1634, 1644, 48 L.Ed.2d 96 (1976); *Mattz v. Arnett*, 412 U.S. 481, 496 n.18, 93 S.Ct. 2245, 2254, n.18, 37 L.Ed.2d 92 (1973).

In these circumstances section 26 can have no effect on the Tribe's water rights.

Defendant City of Reno suggests alternatively that section 26 had a broader purpose than reclamation: it was intended to compel members of the Tribe to become farmers, by extinguishing the Tribe's fishery. We do not doubt that such a step might have been consistent with the mood of the times. *See, e. g., Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977). Nor do we doubt that Congress had the power to take such a step. *See Lone Wolf v. Hitchcock,* 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903). However, we have not been directed to any legislative history of the 1904 Act showing an intent to extinguish the fishery, and we find no such indication in the text of the Act.[9] We must therefore reject the City's suggestion.

The City also contends that section 26 was in effect implemented in the *Orr Ditch* proceedings. We see no merit in this argument. There is no evidence that in the course

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[9]Compare the history of the neighboring Walker River Indian Reservation, which was established by the same document and confirmed by a nearly identical executive order as established the Pyramid Lake Reservation. Both reservations included lakes with fisheries and the lower reaches of rivers feeding the lakes. The statute authorizing the allotment of the Walker River Reservation provided for 20 acre allotments and, with the consent of a majority of the Tribe, the relinquishment of the rest of the reservation. 32 Stat. 245, 260. Pursuant to this statute most of the Walker River Reservation, including Walker Lake, was ceded to the government. *United States v. Southern Pac. Transp. Co., supra,* 543 F.2d at 693-96. If Congress intended to extinguish the Tribe's fishery, we must assume that the allotment process, demonstrated on the Walker River Reservation, was the means Congress chose.

of the *Orr Ditch* proceedings, government officials even purported to allot tribal lands and distribute the surplus. Without taking these steps, there could be no reduction of the Tribe's water rights under section 26 of the 1904 Act. Nor was there any attempt to provide compensation to the Tribe for taking surplus lands, which section 26 clearly required.[10]

B. Was the Secretary Authorized to Obtain a Judicial Decree Quantifying Reserved Water Rights?

Section 10 of the Reclamation Act of 1902 authorized the Secretary "to perform any and all acts . . . as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect." It is reasonable to conclude that an action to quantify reserved water rights was within the authority conferred by section 10 of the Reclamation Act of 1902. This authority, with the government's guardianship interest in Indian trust land,

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[10]The district court did not rest its holding directly on 25 U.S.C. §§ 2 and 9. However, the defendants urge that two cases interpreting those sections, *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988, 77 S.Ct. 396, 1 L.Ed.2d 367 (1957) (*Ahtanum I*), and 330 F.2d 897 (9th Cir. 1964), *cert. denied*, 381 U.S. 924, 85 S.Ct. 1558, 14 L.Ed.2d 683 (1965) (*Ahtanum II*), provide alternative authority for the Secretary to extinguish Indian waters.

Even if we agreed that the *Ahtanum* cases could be extended by analogy to this case, those cases have been modified by *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962), which was decided after *Ahtanum I* and before *Ahtanum II*. Under *Kake*, agreements between the government and non-Indians to alienate Indian property can only be valid if they are needed "to implement specific laws" other than 25 U.S.C. §§ 2 and 9. To be valid, then, the Secretary's conduct in *Orr Ditch* must find its basic authority elsewhere.

necessarily implied some authority to represent Reservation interests in litigation. *See Heckman v. United States,* 224 U.S. 413, 437-39, 32 S.Ct. 424, 431-432, 56 L.Ed. 820 (1912) (suit to cancel conveyance of restricted Indian land); *United States v. Rickert,* 188 U.S. 432, 23 S.Ct. 478, 47 L.Ed. 532 (1903) (action to enjoin unauthorized taxation of Indian property); *Cramer v. United States,* 261 U.S. 219, 43 S.Ct. 342, 67 L.Ed. 622 (1923); *United States v. Ahtanum Irrigation District,* 236 F.2d 321 (9th Cir. 1956), *cert. denied,* 352 U.S. 988, 77 S.Ct. 386, 1 L.Ed.2d 367 (1957) (suit to establish Indian water right).

The authority to represent the Tribe in litigation must be distinguished from the authority to extinguish tribal property interests. The Secretary's policy decisions regarding the conduct of the *Orr Ditch* litigation could not, in themselves, extinguish the Tribe's property interests. To the extent extinguishment occurs, it is the result of giving the *Orr Ditch* decree preclusive effect, which could not be determined either by administrative officials or by the court rendering the decree. *Taunton Gardens Co. v. Hills,* 557 F.2d 877 (1st Cir. 1977); *Gonzales v. Cassidy,* 474 F.2d 67, 74 (5th Cir. 1973); Restatement of Judgments, § 86, Comment h (1942). *See also* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure,* 81 Harv.L.Rev. 356, 393 (1967).

Authority to represent the Reservation in litigation does not give the government completely unrestricted control over the litigation. The government acts as a trustee, which implies obligations which may supplement the obligations of an advocate. *See, e. g.,* Restatement (Second) of Trusts

§§ 170 & Comments p, q, r (1959). It is therefore appropriate for courts to be concerned with the adequacy of the government's representation of its Indian wards, and to grant tribes leave to intervene where proper. *See, e. g., New Mexico v. Aamodt*, 537 F.2d 1102, 1106 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121, 97 S.Ct. 1157, 51 L.Ed.2d 572 (1977); *Manygoats v. Kleppe*, 558 F.2d 556 (10th Cir. 1977).

Once litigation is concluded, a court's focus must shift. A collateral attack on a final judgment implicates a range of interests. We must be concerned with the adequacy of representation afforded the Reservation. We must also protect adverse parties who have reasonably relied on the government's authority in the litigation. Principles of res judicata are designed to take these divergent interests into account. Accordingly, we turn to consider the requirements of res judicata rules.

II. Res Judicata.

We next address the question whether, under traditional principles of res judicata, the *Orr Ditch* litigation can preclude litigation of the cause of action asserted here. We first decide whether this cause of action is part of the *Orr Ditch* cause of action. We then consider what parties may take advantage of the *Orr Ditch* decree.

A. Is This Cause of Action Part of the Cause of Action Asserted in *Orr Ditch*?

The Tribe contends that the cause of action the government asserted in *Orr Ditch* is not the same cause of action asserted here. It makes three arguments: First, it points

out that different evidence would be required to sustain a fishery water right and an irrigation right. Second, it suggests that in *Orr Ditch* the government intended to assert only a cause of action for irrigation water, not for water for all Reservation purposes. Third, it maintains that in equitable water adjudications, only claims that are actually litigated merge into the final decree. We will address these arguments in order.

The Tribe asserts that different evidence would be required to establish a fishery water right than to establish an irrigation water right. See *United States v. The Haytian Republic,* 154 U.S. 118, 125, 14 S.Ct. 992, 994, 38 L.Ed. 930 (1894); *Bankers Trust Co. v. Pacific Employers Insurance Co.,* 282 F.2d 106 (9th Cir. 1960), *cert. denied,* 368 U.S. 822, 82 S.Ct. 41, 7 L.Ed.2d 27 (1961); Restatement of Judgments, *supra* § 61. We find this analysis unpersuasive. The basis for either kind of reserved right would be the same: the executive actions by which the Reservation was established, and the intent that motivated those actions. *See United States v. Walker River Irrigation District,* 104 F.2d 334 (9th Cir. 1939). The priority date depended on the same evidence. The water rights are appurtenant to the same reservation, and relate to the same source of water. Though a determination of quantity would depend on different evidence, this by itself is insufficient to distinguish this cause of action from the *Orr Ditch* cause of action. The "same evidence" test is but one of many tests used to distinguish one cause of action from another. *See* 1B *Moore's Federal Practice* ¶ 0.410[1], at 1157-58 (2d ed. 1980); Restatement (Second) of Judgments § 61 (Tent. Draft No. 1, 1973). We find it undeterminative in this case.

This issue is determined by the district court's findings of fact regarding the intent of the government in bringing the *Orr Ditch* case. The district court found "[t]hat *Orr Ditch* was intended by all concerned, lawyers, litigants and judges, as a general all inclusive water adjudication suit which sought to adjudicate all rights and claims" to the waters of the Truckee. This finding is not clearly erroneous. The complaint was drafted in comprehensive terms, and was certainly adequate to assert all of the government's water rights claims. The purpose of the proceeding was to obtain a decree upon which all parties could rely. This purpose would have been defeated if the government's action did not include important claims that could upset the decreed rights of the parties.

In *Orr Ditch* the government might have sought an adjudication for certain water uses. *See Hudson v. West,* 47 Cal.2d 823, 306 P.2d 807, 811 (1957). It might have sought a decree leaving open the possibility of expanding the Tribe's water right, as in *Conrad Investment Co. v. United States, supra,* 161 F. 829. It chose, instead, a comprehensive adjudication. *See United States v. Walker River Irrigation District, supra,* 104 F.2d 334. Accordingly, we reject the Tribe's suggestion that the *Orr Ditch* cause of action was intended to be less than comprehensive.

The Tribe asserts that in equitable water adjudications only claims actually litigated are barred from relitigation. In effect, this rule would abolish the broader res judicata doctrine of claim preclusion in water adjudications, leaving only the doctrine of collateral estoppel or issue preclusion,

to prevent relitigation.[11] We cannot accept this position in its full sweep. We are bound by the district court's finding that the government placed in issue the full Reservation cause of action. Between parties with adverse claims, causes of action properly placed in issue may merge in an equity decree. *Union Mill & Mining Co. v. Dangberg*, 81 F. 73 (C.C.D.Nev.1897); 3 *Kinney on Irrigation and Water Rights* § 1536, at 2766 (1912). We therefore reject the Tribe's suggestion that the *Orr Ditch* decree could bar relitigation of only those claims actually litigated.

B. Parties

1. The *Orr Ditch* Defendants.

The Tribe contends that it was improperly and inadequately represented in the *Orr Ditch* case and cannot be bound by the judgment, consistent with due process. The *Orr Ditch* defendants insist that due process offers the Tribe no protection in this setting. They also assert that they had no knowledge of any impropriety in the government's representation in *Orr Ditch*, and so are entitled to rely on the decree. We address the defendants' arguments in order.

Generally, preclusion extends no further than to the parties of the prior litigation. *Hansberry v. Lee*, 311 U.S.

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[11]Under the doctrine of res judicata (or "claim preclusion") a judgment on the merits in a prior action involving the same parties or their privies bars a second action based on the same cause of action. The bar applies not only to matters that were actually litigated but also to all claims that might have been litigated. In contrast, collateral estoppel (or "issue preclusion") precludes a second litigation only of issues that were actually litigated. *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 326, 75 S.Ct. 865, 867-868, 99 L.Ed. 1122 (1955).

32, 40, 61 S.Ct. 115, 117, 85 L.Ed. 22 (1940). This rule stems from our society's concern for individual rights as expressed in the due process clauses of the fifth and fourteenth amendments. *See Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329, 91 S.Ct. 1434, 1443, 28 L.Ed.2d 788 (1971) (dictum); *Postal Telegraph Cable Co. v. City of Newport*, 247, U.S. 464, 476, 38 S.Ct. 566, 570-571, 62 L.Ed. 1215 (1918); 1B *Moore's Federal Practice, supra*, ¶ 0.411[1], at 1252; F. James & G. Hazard, *Civil Procedure* § 11.22 (2d ed. 1977). Thus, "judicial action enforcing [the prior judgment] against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require." *Hansberry v. Lee, supra*, 311 U.S. at 41, 61 S.Ct. at 118. Although these authorities deal with personal judgments their reasoning on procedural due process applies to quiet title judgments. *See O'Boyle v. Bevil*, 259 F.2d 506, 513 (5th Cir. 1958), *cert. denied*, 359 U.S. 913, 79 S.Ct. 590, 3 L.Ed.2d 576 (1959) (citing *Hansberry v. Lee, supra*).

This general rule is subject to an exception for persons in privity with parties. *See* 1B *Moore's Federal Practice, supra*, ¶ 0.411[1]. Privity "denotes a legal conclusion rather than a judgmental process." *Southwest Airlines Co. v. Texas International Airlines, Inc.*, 546 F.2d 84, 95 (5th Cir.), *cert. denied*, 434 U.S. 832, 98 S.Ct. 117, 54 L.Ed.2d 93 (1977). It simply represents a conclusion that a person is so closely connected to a party that with respect to the issues in litigation the person's interests are essentially the same as those litigated interests of the party. *Jefferson School of Social Science v. Subversive Activities Control*

Board, 331 F.2d 76, 83 (D.C. Cir. 1963). A finding of privity, then, reflects a belief that the relation between the party and non-party is so close that the judgment may fairly bind the non-party. F. James & G. Hazard, *supra*, at 576. If the relationship is not sufficiently close, privity is lacking and preclusion in that case would necessarily deny due process to the non-party.

Privity and fairness exist if a party represented the interests of the non-party, such as a guardian or fiduciary might represent a ward or beneficiary. The case law clearly supports this principle, *see, e. g., Kersh Lake Drainage District v. Johnson*, 309 U.S. 485, 491, 60 S.Ct. 640, 644, 84 L.Ed. 881 (1940) (decree binds bondholders represented by indenture trustee under bond issue); *Heckman v. United States, supra*, 224 U.S. at 445-46, 32 S.Ct. at 434-435 (decree will bind Indians represented by United States); *Kerrison v. Stewart*, 93 U.S. 155, 160, 23 L.Ed. 843 (1876) (decree binds beneficiaries represented by trustee), and the rule appears in the Restatement (Second) of Judgments.

> "A person who is not a party to an action but who is represented by a party is bound by . . . the rules of res judicata as though he were a party. A person is represented by a party who is:
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> "(a) The trustee of an estate or interest of which the person is a beneficiary; or . . .
>
> "(c) The executor, administrator, guardian, conservator, or similar fiduciary manager of an interest of which the person is a beneficiary; or
>
> "(d) An official or agency invested by law with authority to represent the person's interests; or

"(e) The representative of a class of persons similarly situated designated as such with the approval of the court, of which the person is a member.

Restatement (Second) of Judgments § 85 (Tent. Draft No. 2, 1975).[12] Thus, the general rule that non-parties are not precluded is subject to the privity exception when a non-party was represented in the prior proceeding.

But this exception is itself subject to exception. Representation of a non-party will not always result in the same preclusive effects that bind parties.

"A person is not bound by a judgment for or against a party who purports to represent him if:

"(d) With respect to the representative of a class, there was such a substantial divergence of interest between him and the members of the class, or a group within the class, that he could not fairly represent them with respect to the matters as to which the judgment is subsequently invoked, or

"(e) The representative failed to prosecute or defend the action with due diligence and reasonable prudence, and the opposing party was on notice of facts making that failure apparent."

Id. § 86. Courts considering the preclusive effects of representative litigation have noted this limit on the effects of such judgments. *See e. g., Hansberry v. Lee, supra,* 311 U.S. at 42-44, 61 S.Ct. at 118-119 (conflicting interests of representatives and members of class prevent finding of res judicata that would infringe due process rights of non-parties); *Kersh Lake Drainage District v. Johnson,*

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[12] If a person was represented in the prior proceeding, a judgment may bind him even though he was not personally served. See *id.*, § 85(2).

supra, 309 U.S. at 491, 60 S.Ct. at 644 (judgment from representative litigation by indenture trustee binds bondholders unless there is fraud or collusion); *Kerrison v. Stewart, supra*, 93 U.S. at 160 (judgment from representative litigation by trustee binds beneficiaries unless there is fraud or collusion between the representative and the adverse party). Fairness requires that courts place these limits on the binding effects of judgments obtained by representatives. In the context of class actions and other types of representative suits, at some point the "represented" persons' interest in freedom from a flawed judgment overshadows policies against relitigation.[13] The exceptions

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[13]The requisites for preclusion differ depending upon the type of representation. In a class action or a case of "virtual representation" by the government, a divergence of interests between the representative and the represented persons denies the judgment preclusive effects as against the latter. *See Hansberry v. Lee, supra*, 311 U.S. at 42-44, 61 S.Ct. at 118-119 (class action); *Southwest Airlines Co. v. Texas Int'l Airlines, Inc., supra*, 546 F.2d at 97-102 (virtual representation by government of private interests); *Aerojet Gen. Corp. v. Askew*, 511 F.2d 710, 719-20 (5th Cir. 1975) (virtual representation by state entity of county entity). On the other hand, a judgment obtained by a designated representative such as a trustee is subject to a different standard of review: the represented person is precluded unless there is fraud or collusion in the prior proceeding. *See e. g., Kerrison v. Stewart, supra*, 93 U.S. at 160; *see also*, Restatement (Second) of Judgments, *supra*, § 86 Comment f. On the issue of adequate representation, class actions are subject to greater scrutiny than are prior actions by a trustee or guardian. F. James & G. Hazard, *supra*, § 11.28, at 588. The different standards result from the different character of the representation in these cases.

> "In action by or against the representative of a class, the thoroughness and vigor of the representation is properly subject to particular scrutiny because the bonds of responsibility between the representative and those for whom he acts are

listed in section 86 of the Restatement (Second) constitute instances when the "represented" persons' interests predominate. Thus, a holding within one of the exceptions is essentially equivalent to a finding that preclusion against the represented party would be a denial of due process.[14]

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transitory and ordinarily not otherwise readily enforcible. Similar scrutiny is appropriate concerning the adequacy of representation in actions by or against a public agency or official where the judgment would have preclusive effects in an action by citizens or taxpayers concerning the same subject matter."

Restatement (Second) of Judgments, *supra*, § 86 Comment f.

Nevertheless, the same general principles control all these actions. "Although *Hansberry* involved a class action suit, its due process principles also control" the general application of res judicata. *Southwest Airlines Co. v. Texas Int'l Airlines, Inc.*, 546 F.2d at 95-96. *Cf.* Restatement (Second) of Judgments, *supra*, § 86 Reporter's Note, at 79 (*Hansberry v. Lee* "stands in any event as a reminder that there are constitutional limits on giving binding effect to litigation conducted through representatives"). The differing dimensions of preclusion among the different types of representative suits simply indicate that the balance struck for each depends on the different concerns presented by each situation.

[14]This view indicates no more than that the exceptions to the preclusive effects of representative suits may be seen from a second perspective.

> "In one sense this Section [86] is a list of exceptions to the general rule that a representative proceeding is binding on the person represented. It may also be considered as describing the situations in which the proceedings fail to conform to the necessary conditions for representation and application of the general principle that one is not bound by an adjudication to which he was neither a party nor represented by one. The provisions of this section are thus closely related to, if indeed they are not particularized expressions of, the requirements of due process, a fact which historically was obscured by the tendency of courts to see some of these questions in the context of necessary parties issues."

Restatement (Second) of Judgments, *supra*, § 86 Reporter's Note, at 79.

In such cases the "represented" persons are not in privity with the "representative" parties.

In order to answer the privity question, we must first determine whether the Tribe is entitled to due process protection in this setting. The defendants suggest that due process offers the Tribe no comfort. They offer two reasons in support of this position. First, they claim that the federal-Indian relation is special and not subject to normal due process analysis. Second, they conclude that these Indians are not entitled to due process protection of these water rights, in any event, because the rights stem from an executive order reservation, a reservation that in the defendants' views creates an insufficient "property interest" for due process purposes. Neither of these reasons can withstand scrutiny.

We hold that the Tribe has a legally cognizable "property" interest in reservation property interests and therefore due process protections apply. The test of such interests appears in *Board of Regents v. Roth*, 408 U.S. 564 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972):

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims."

408 U.S. at 577, 92 S.Ct. at 2709.

To have a sufficient property interest the Tribe need not show that it may keep the water rights against all the world. The Supreme Court "has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights." *Id.* at 571, 92 S.Ct. at 2706; *see Graham v. Richardson*, 403 U.S. 365, 374, 91 S.Ct. 1848, 1853, 29 L.Ed.2d 534 (1971). Indeed this court has held that Native Alaskans seeking land allotments from the Secretary of the Interior are entitled to a due process hearing before their applications are denied. *Pence v. Kleppe*, 529 F.2d 135 (9th Cir. 1976). The *Pence* Court reversed the district court's holding that the plaintiffs had no property interest in allotment lands which the Secretary could award in his discretion. *Id.* at 140-41. The courts have applied such logic in a variety of contexts. *See, e. g., Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25, L.Ed.2d 287 (1970) (statutory entitlement to welfare benefits); *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) (interest in secured property). By these standards Indian water rights merit due process protection. The property interest asserted here is at least as great as the interest at stake in *Pence*.

A different result is not mandated just because this Tribe derives its water rights from executive order. In general, the government may retake executive order lands without compensation. *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 325-30, 62 S.Ct. 1095, 1098-1101, 86 L.Ed. 1501 (1942).[15] But that rule does not mean that executive order

[15]In 1946 Congress enacted the Indian Claims Commission Act, which currently provides that the Commission shall hear and de-

lands or appurtenant rights may be taken without procedural due process. As this Court has recently stated: "As long as an executive order creating a reservation remains in effect, the Indian title to the reservation lands deserves the same protection as the Indian title to reservations created by treaty or statute." *United States v. Southern Pacific Transportation Co., supra*, 543 F.2d at 686. Thus, the question of a compensable interest in executive order lands is irrelevant, just as the question of a compensable interest in discretionary allotments was not an issue in the *Pence* case.

The defendants next claim that because of the "unique" Federal-Indian relation, government representation of Indians *per se* satisfies due process. Such a claim is one expression of the overly broad view that government control over Indian property is without limit. But the federal-Indian relation does not require a holding that faithless governmental acts against the Indians are not subject to review by the courts on due process grounds.

Case law dealing with compensation for taking of Indian rights provides a useful analogy. Authorities have long recognized that the United States stands in a trust position with respect to the Indians. This relation had been

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termine "claims in law and equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President . . ." 25 U.S.C.A. § 70a (West. Supp. 1979). This language provides jurisdiction in the Indian Claims Commission to hear claims based on executive order lands. *See Three Affiliated Tribes of the Fort Berthold Reservation v. United States*, 390 F.2d 686 (Ct.Cl.1962). However, the Act confers jurisdiction only as to claims arising before August 13, 1946, and presented to the Commission by August 13, 1951. *See* 25 U.S.C. § 70k; *Navajo Tribe v. United States*, 601 F.2d 536 (Ct.Cl.1979), *cert. denied*, 444 U.S. 1072, 100 S.Ct. 1016, 62 L.Ed.2d 753 (1980).

compared with that of guardian-ward. *See, e. g., Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 17, 8 L.Ed.2d 25 (1831). This guardianship concept has been used to relax court control. The government can thus take some actions that would otherwise seem confiscatory. F. Cohen, *Handbook of Federal Indian Law* 170-71 (1942). Actions taken by the United States in its trust capacity are not ordinarily subject to judicial review. Much as a fiduciary's management of trust assets need not be perfect, the government's good faith *management* of Indian property held in trust cannot be questioned by the courts. *See Lone Wolf v. Hitchcock, supra,* 187 U.S. at 565, 568, 23 S.Ct. at 221, 222.

But one would paint with too broad a brush if one concluded that cases such as *Lone Wolf* generally restrained the court's scrutiny of the government's dealings with Indians. Plenary congressional power over Indians does not mean that congressional power over Indians is not subject to express limitations upon congressional power, such as the Bill of Rights. F. Cohen, *supra,* at 91 (citing *Stephens v. Cherokee Nation,* 174 U.S. 445, 19 S.Ct. 722, 43 L.Ed. 1041 (1879)). In cases where the government does not exercise good faith, judicial due process review protects the Indians. *See United States v. Creek Nation,* 295 U.S. 103, 110, 55 S.Ct. 681, 684, 79 L.Ed. 1331 (1935); *Three Tribes of Fort Berthold Reservation v. United States,* 390 F.2d 686 (Ct.Cl.1968). The Supreme Court has recently reaffirmed that *Lone Wolf's* scope is limited to instances of good faith management. *See United States v. Sioux Nation of Indians,* 448 U.S. 371, 406-417, 100 S.Ct. 2716, 2736-2741, 65 L.Ed.2d 844, 871-76 (1980). Thus, the insulation accorded actions by the government-trustee does not

apply to instances of governmental self-dealing because "[s]poliation is not management." *Shoshone Tribe v. United States*, 299 U.S. 476, 498, 57 S.Ct. 244, 252, 81 L.Ed. 360 (1937). When the government sheds its "trustee" role for one of "taker" the due process clause protects Indians' rights[16] by allowing compensation for the taking. Similar principles should control the *procedural* due process boundaries of the federal-Indian relation[17]—when the govern-

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[16]The *Sioux Nation* Court limited its holding to Indian lands recognized by Congress because only those lands give rise to a compensable interest. *Id.* 448 U.S. at 415 n.29, 100 S.Ct. at 2740 n.29, 65 L.Ed.2d at 875 n.29. Although this limitation has meaning when determining what is compensable under the due process clause, such a limitation does not apply in the procedural due process setting, which does not hinge on the distinction between "rights" and "privileges".

[17]Just as the *Lone Wolf* obstacle is illusory with respect to the Indians' entitlement to due process, so too are the other potential obstacles.

It is true that the federal-Indian relation must be evaluated in light of a special historical and legal context. Congress has constitutional authority to 'regulate commerce with . . . the Indian tribes.' U.S.Const. art. I, § 8, cl. 3. In addition, the United States historically used its treaty power to control Indian affairs. *See* F. Cohen, *supra*, at 89-91. Indians have long been dependent on the government, as a ward is dependent on a guardian. *See Cherokee Nation v. Georgia*, *supra*, 30 U.S. (5 Pet.) at 17, 8 L.Ed. 25; *United States v. Kagama*, 118 U.S. 375, 383-84, 6 S.Ct. 1109, 1113-1114, 30 L.Ed. 228 (1886). Thus, many actions may be insulated from strict judicial review. A preferential hiring of Indians in the BIA need only pass a rational basis test. *Morton v. Mancari*, 417 U.S. 535, 553-54, 94 S.Ct. 2474, 2484, 41 L.Ed.2d 290 (1974). But cases such as *Mancari* do not support a general rational basis test for governmental actions involving Indians. In *Sioux Nation* the Supreme Court found *Mancari* to be an inapt analogy for determining whether the government acted in a trustee's or a taker's capacity. *Sioux Nation v. United States*, *supra*, 448 U.S. at 413 n.28, 100 S.Ct. at 2739 n.28, 65 L.Ed.2d at 875 n.28. It is also inapt in answering our question.

ment as a trustee in good faith adequately represents the Indians they are bound by any ensuing judgment, but when administrative officials violate their trust, due process should prevent preclusion of the Indians to the extent it would protect similarly represented non-Indians.

The Tribe's rights in this case, thus, have familiar dimensions. In general, representation by the United States will bind an Indian tribe and the individual Indians. *See Heckman v. United States, supra,* 224 U.S. at 445-46, 32 S.Ct. at 434-435; *United States v. Emmons,* 351 F.2d 603, 604 (9th Cir. 1965); *Oklahoma v. United States,* 155 F.2d 496, 498 (10th Cir. 1946); *Creek Indians National Council v. Sinclair Prairie Oil Co.,* 142 F.2d 842, 845 (10th Cir.), *cert. denied* 323 U.S. 78, 65 S.Ct. 269, 89 L.Ed. 624 (1944); *Pueblo of Picuris v. Abeyta,* 50 F.2d 12, 13 (10th Cir. 1931); *Vinson v. Graham,* 44 F.2d 772, 779 (10th Cir. 1930), *cert. denied,* 283 U.S. 819, 51 S.Ct. 344, 75 L.Ed. 1435 (1931); *Winship v. Ricketts,* 32 F.2d 476, 479 (8th Cir. 1929). When the government breaches its trust to the Tribes while openly advancing its own interest the Tribe is not necessarily bound:[18]

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[18]In none of the cases cited where the government represented Indians has the issue of inadequate representation arisen. Nevertheless, such a limitation to preclusion based on due process is proper. First, the leading case, *Heckman v. United States, supra,* 224 U.S. at 446, 32 S.Ct. at 435, in establishing its rule for preclusion, relied primarily on a case of trustee, representation that explicitly placed a limit on preclusion in cases of fraud or collusion. *See Kerrison v. Stewart, supra,* 93 U.S. at 160. Second, neither the *Heckman* Court nor any other court has stated that preclusion against Indians applies despite fraud or collusion. Enroute to finding a group of Indians to be necessary parties, one court has recently distinguished *Heckman* as a case where the "Indians were

> [A] fiduciary does not bind those for whom he acts as against third parties who are aware of the fiduciary's failure to fulfill his responsibility. As applied to litigation, this principle implies that a judgment is not binding on the represented person where it is the product of collusion between the representative and the opposing party, or where, to the knowledge of the opposing party, the representative seeks to further his own interest at the expense of the represented person. Where the representative's management of the litigation is so grossly deficient as to be apparent to the opposing party, it likewise creates no justifiable reliance interest in the adjudication on the part of the opposing party."

Restatement (Second) of Judgments, *supra*, § 86 Comment f. We need address only the question as to the defendants' knowledge of government impropriety in the *Orr Ditch* litigation. We assume, but do not decide, that the gov-

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adequately represented by their guardian, the United States." *Manygoats v. Kleppe*, 558 F.2d 556, 558 (10th Cir. 1977). We can discern no reason why Indians should not be entitled to adequate representation and protection from fraud or collusion.

Indeed the rule espoused here receives substantial support from recent Indian intervention cases. Where there was a "conflict of interest between the proprietary interests of the United States" and the Indians, one court allowed intervention because "[i]n such a situation, adequate representation of both interests by the same counsel is impossible." *New Mexico v. Aamodt*, *supra*, 537 F.2d at 1106-07. *See also Cheyenne River Sioux Indians v. United States*, 338 F.2d 906 (8th Cir. 1964), *cert. denied*, 382 U.S. 815, 86 S.Ct. 34, 15 L.Ed.2d 62 (1965) (no right of Indians to intervene where government represented them in good faith). *Cf. Rincon Band of Mission Indians v. Escondido Mut. Water Co.*, 459 F.2d 1082, 1084-85 (9th Cir. 1972) (Indians' request for representation by United States denied where government's counsel would be faced with a conflict of interest.)

ernment's representation of the Tribe in *Orr Ditch* was improper and inadequate.

The question is whether the *Orr Ditch* defendants were aware of a failure by the government to fulfill its responsibility to adequately represent the Tribe in the litigation. The answer to this question determines whether the *Orr Ditch* defendants reasonably relied on the government's representation of the Tribe's interests. The district court found that any impropriety in the government's representation "was unknown to the defendants in *Orr Ditch*." Finding no. 31, R. 5602. The plaintiffs do not challenge this finding. We cannot say it is clearly erroneous. Accordingly, the *Orr Ditch* defendants are entitled to rely on the final decree.

We cannot agree that public policy requires us to suspend the application of res judicata in this instance. Res judicata serves important policies. It fosters reliance on judicial decrees, eliminates expense to parties, conserves judicial resources, and minimizes the possibility of inconsistent results. *Commissioner v. Sunnen*, 333 U.S. 591, 597, 68 S.Ct. 715, 719, 92 L.Ed. 898 (1948). There are hardly maxims "more firmly established or of more value in the administration of justice, than those designed to prevent repetitious relitigation." *United States v. Throckmorton*, 98 U.S. 61, 65, 25 L.Ed. 93 (1878). We are not free to suspend the application of the *Orr Ditch* decree merely because we may think it erroneous. *Reed v. Allen*, 286 U.S. 191, 199-200, 52 S.Ct. 532, 533-34, 76 L.Ed. 1054 (1932); *Hatchitt v. United States*, 158 F.2d 754, 756 (9th Cir. 1946).

We do not minimize the policies that weigh against the finality of the decree. We place a high value on the nation's duty to protect Indian resources, consistent with congressional and constitutional standards. *Red Fox v. Red Fox*, 564 F.2d 361, 365 (9th Cir. 1977). We know of no means of measuring the value of Pyramid Lake. If restored, its fishery would have enormous worth. We are also mindful of the nation's interest in the survival of endangered species. *See* 16 U.S.C. § 1531 *et seq.* (Endangered Species Act); *Udall v. FPC*, 387 U.S. 428, 87 S.Ct. 1712, 18 L.Ed.2d 869 (1967).

Nevertheless, we hold the policies served by res judicata preponderate. These policies apply with special force when titles to real property are involved. *Minnesota Mining Co. v. National Mining Co.*, 70 U.S. (3 Wall.) 332, 334, 18 L.Ed. 42 (1866); *United States v. Title Insurance & Trust Co.*, 265 U.S. 472, 486-87, 44 S.Ct. 621, 623, 68 L.Ed. 1110 (1924). In recent years both Congress and the Supreme Court have recognized that finality in water adjudications cannot be attained when reserved rights remain unsettled. *See, e. g.*, 43 U.S.C. § 666 (McCarran Amendment); S.Rep. 755, 82d Cong. 1st Sess. (1951); *United States v. New Mexico*, 438 U.S. 696, 98 S.Ct. 3012, 57 L.Ed. 2d 1052 (1978); *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 810-11, 96 S.Ct. 1236, 1242-1243, 47 L.Ed.2d 483 (1976). *And see Public Land Law Review Commission, One Third of the Nation's Lands* 144 (1970); 6 *Waters and Water Rights, supra*, § 530 at 516. There is no question that the *Orr Ditch* defendants and many others have relied heavily on the finality of the decree. The government's representation of the Tribe's inter-

ests in *Orr Ditch* was analogous to that of a faithless fiduciary who was nevertheless authorized to represent its beneficiary. We hold that the district court properly dismissed the action with respect to the *Orr Ditch* defendants and their successors in interest.

We also hold that subsequent appropriators who were not parties to *Orr Ditch*, but who have reasonably relied on the finality of the *Orr Ditch* decree, are entitled to rely on its finality. Clearly the government intended to enable such reliance when it consented to entry of the final *Orr Ditch* decree. To be sure, the government did not employ a statutory *in rem* procedure. *Orr Ditch* was an equitable *in personam* action whose res judicata effect would normally be limited to parties and their privies. But this was no garden variety quiet title action. It was a virtually comprehensive adjudication that approximated a statutory *in rem* proceeding, and avoided the defects associated with *in personam* water adjudications. The government framed its complaint in the broadest possible way, to assert the court's jurisdiction power over all water users on the river. It provided individual notice and widespread publicity of the action. As with Nevada procedure, great care was taken to assemble the most reliable and comprehensive data concerning the parties' needs and the river's supply. Interested parties not represented by the government were given every opportunity to present their claims not just at one hearing, but repeatedly, in proceedings spanning years. There was adversity between the plaintiff and the defendants, all concerned perceived that adversity, and it could justly be supposed that the parties would assert all their claims and defenses. The resulting decree was drafted in

broad terms, and the *Orr Ditch* parties were barred from relitigating in any way the claims determined.

In these circumstances it would be manifestly unjust to permit the *Orr Ditch* defendants to rely on the decree, and not to permit subsequent appropriators, defendants here, to do the same. *Cf. City of Los Angeles v. City of San Fernando,* 14 Cal.3d 199, 123 Cal.Rptr. 1, 537 P.2d 1250, 1273 (1975); Restatement of Judgments, *supra,* § 70. Any other conclusion would make it impossible ever finally to quantify a reserved water right.

2. Truckee-Carson Irrigation District[19].

As a general matter, a judgment does not conclude parties who were not adversaries under the pleadings. *Dobbins v. Barnes,* 204 F.2d 546 (9th Cir. 1953); Restatement of Judgments, *supra,* § 82; Restatement (Second) of Judgments, *supra,* § 82; 1B *Moore's Federal Practice, supra,* ¶ 0.411[2]; Vestal, *Preclusion/Res Judicata Variables: Parties,* 50 Iowa L.Rev. 27, 29 (1964). This is because "the rules of res judicata are based upon an adversary system of procedure which exists for the purpose of giving an opportunity to persons to litigate claims against each other." Restatement of Judgments, *supra,* § 82, Comment a. Where there is no adversity under the pleadings, co-parties may

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[19]The record does not reveal to what extent, if any, TCID or its members derive water rights apart from those decreed for the use of the Project in *Orr Ditch.* This section is intended to apply only to *Orr Ditch* water rights decreed to the government for the use of the Project. If TCID or its members derive water rights from any of the named defendants in *Orr Ditch,* or from subsequent appropriations not adjudicated in *Orr Ditch,* this discussion does not affect those rights.

be bound only as to issues actually or necessarily litigated. *Town of Flagstaff v. Walsh*, 9 F.2d 590 (9th Cir.), *cert. denied*, 273 U.S. 695, 47 S.Ct. 92, 71 L.Ed. 844 (1926). *See also*, Restatement (Second) of Judgments, *supra*, Comment a; *Developments in the Law—Res Judicata*, 65 Harv.L. Rev. 818, 860-61 (1952); Annot., 24 A.L.R.3d 318 (1969).

A strict adversity requirement does not necessarily fit the realities of water adjudications. All parties' water rights are interdependent. *See Frost v. Alturas*, 11 Idaho 294, 81 P. 996, 998 (1905); Kinney, *Irrigation and Water Rights* at 277. Stability in water rights therefore requires that all parties be bound in all combinations. Further, in many water adjudications there is no actual controversy between the parties; the proceedings may serve primarily an administrative purpose. *Lasky, From Prior Appropriation to Economic Distribution of Water by the State—Via Irrigation Administration*, 1 Rocky Mt.L.Rev. 161, 188 (1929). Were we concerned only with parties or coparties, we might be persuaded to relax the adversity requirement.

The Tribe and the Project were neither parties nor coparties, however. They were non-parties who were represented simultaneously by the same government attorneys. In representative litigation we should be especially careful not to infer adversity between interests represented by a single litigant. The very idea of representative litigation is defeated if the representative asserts adverse claims simultaneously. Under most circumstances, such representation is by definition inadequate. *See Hansberry v. Lee*, *supra*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22; *Manygoats v. Kleppe*, *supra*, 558 F.2d at 558; *Rincon Band of Mission*

Indians v. Escondido Mutual Water Co., 459 F.2d 1082, 1085 (9th Cir. 1972); *Olson v. Miller*, 263 F.2d 738, 740 (D.C.Cir.1959); *Green v. Brophy*, 110 F.2d 539, 542 (D.C. Cir.1940); *In re Estate of Wiswall*, 11 Ariz.App. 314, 464 P.2d 634, 641 (1970); *Bogert on Trusts*, § 593 (2d ed. 1960). *But compare United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); *United States v. ICC*, 337 U.S. 426, 69 S.Ct. 1410, 93 L.Ed. 1451 (1949). Rules of res judicata have evolved safeguards to ensure the integrity of representative functions. Restatement (Second) of Judgments, *supra*, § 80(2), Comment a. We would undermine those safeguards were we lightly to assume that the government intentionally represented conflicting interests.

By representing the Tribe and the Project against the *Orr Ditch* defendants, the government compromised its duty of undivided loyalty to the Tribe. *See* Restatement (Second) of Trusts, *supra*, § 170, & Comments p, q, r. The defendants suggest that the government assumed an even more compromising posture. They suggest that the government not only represented dual interests on the same side of a dispute, but that the government simultaneously, with the same lawyers, represented those dual interests in a dispute between themselves. This posture is completely alien to our adversary system and will not be inferred from ambiguous facts. Before we conclude that government officials have undertaken such representation in litigation, we must be faced with a pleading in which this posture is clearly assumed.

In this case, the government's assumption of such a posture would be especially anomalous because of the possibility of self-dealing at the expense of government wards.

See Navajo Tribe v. United States, 364 F.2d 320 (Ct.Cl. 1966). In determining what effect to give to ambiguous acts of administrative officials we must not draw conclusions that prejudice the government's Indian wards unless the government speaks its prejudicial intent clearly. *See United States v. Santa Fe Pacific R.R., supra*, 314 U.S. at 354, 62 S.Ct. at 255; *United States v. Southern Pacific Transportation Co., supra*, 543 F.2d at 690. Thus, the requirement that adversity be established by pleadings is particularly compelling in this setting.

Both the government and the court were alert to the need to establish adversity among the co-defendants' claims.[39] The government was aware of the usual equity practice to file cross bills to set up adversity between co-parties. *See City of Owensboro v. Westinghouse, Church, Kerr & Co.*, 165 F. 385 (6th Cir. 1908); *Rickey Land & Cattle Co. v. Wood*, 152 F. 22 (9th Cir. 1907), *aff'd*, 218 U.S. 258, 31 S.Ct. 11, 54 L.Ed. 1032 (1910); *Ames Realty Co. v. Big Indian Mining Co.*, 146 F. 166 (C.C.D.Mont. 1906). The government proposed to eliminate this practice in *Orr Ditch*, since the government's complaint and orders of the court had made it clear to all parties that the defendants' claims would be binding *inter se*.

It appears that no similar attention was given to adversity between the Reservation and the Project. Nor did the government file pleadings or the equivalent in which it was explicitly stated that the litigation would bind the Reservation and the Project *inter se*. It is clear from the

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[39]See letter of August 7, 1918 from R. C. Withers, U.S. Dept. of Justice, to Hon. E. S. Farrington, U.S. District Judge. R. 2266-67.

record that the government did not perceive conflict between the claim it pressed on the Tribe's behalf and the claim asserted for the Project. As Truesdell, the Special Assistant U.S. Attorney in charge of the case said in 1919, the government "always had it in mind that there could be no conflict of interest between the Reclamation Project and the Indian reservation." Ex. U-88, at 4. The small reservation claim that was asserted could be satisfied by the return flow from irrigation below the headgate or the Truckee diversion canal. *Id.*[21]

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[21]In 1925 the *Orr Ditch* special master described the reservation claim as follows:

> "Congress has passed an act providing for the allotment of a meager five acres per Indian. Why should anyone begrudge or object to allowing enough water for irrigation by the Indians of these small tracts of land, and of the land they have under cultivation? Under similar conditions white men are not satisfied to try and making a living on such a small amount. . . . Men residing here for 50 years say the last year was dryest [sic] one they have known. Users above the reservation took all the water from the river last summer for irrigation on porous lands in the narrow valley, and the return flow was sufficient for the Indians to produce good crops without depriving the defendants from taking all the water above."

Special Master's Report at 37-38.

In 1922 one of the government's attorneys, Ethelbert Ward, declined to bring to the court's attention complaints that the Indians were not getting enough water to irrigate their crops.

> "In effect this controversy is one between the Indian Service and the Reclamation Service. . . . This matter it seems to me ought to be settled by the Interior Department as between its two bureaus. . . ."

Ex. U-123. *And see* Ex. U-24. This implies that conflicts between the two interests were perceived as administrative matters, not questions for litigation.

We do not accept TCID's suggestion that it became an adverse party in its own right by participating in the negotiations that resulted in the Truckee River Agreement, or by signing that agreement, or by the court's incorporation of that agreement into the *Orr Ditch* final decree. The government was the plaintiff in *Orr Ditch*. It never relinquished or limited its representation of the Project's interests. The final decree confirms the Project's water rights in the government's name. TCID's negotiations with the government and other parties could not alone satisfy the requirement that adversity be explicitly established on the record, by pleadings.

Since there was no adversity under the pleadings between these two interests, the question is then whether the fishery claim asserted here was actually or necessarily litigated in *Orr Ditch*. The district court found "no evidence in this case that a *Winters* implied and reserved water right for fishery purposes was actually ever litigated in the course of the *Orr Ditch* proceedings." Finding No. 25, R. 5600. We agree with this finding. We must therefore reverse the judgment as to TCID.

We realize that this judgment results in hardship for TCID and its members. However, this is mitigated by several factors. First, TCID obtains water from two rivers, the Carson and the Truckee. Even if the Tribe succeeds in establishing its entitlement to substantial additional Truckee River water, it is possible that much of the TCID's need could be satisfied by Carson River water. Second, the Newlands Project is relatively inefficient in its use of water. *See Pyramid Lake Tribe v. Morton, supra,*

354 F.Supp. at 257. Improvements in water storage and distribution could result in substantial efficiencies to ameliorate any hardship to TCID. Third, TCID's right to water is based only in part on the government's representation of TCID's interests in *Orr Ditch*. Their rights are also founded on contracts with the government.[22] If the government breaches its contractual obligations to TCID and its members, traditional remedies may afford protection. Finally, TCID's hardship was avoidable. Either the government or TCID could have taken steps to assure that adversity was clearly established on the record, and they failed to do so.

Accordingly, we reverse the district court's judgment insofar as it dismissed the plaintiffs' complaint against TCID

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[22]TCID's right to water is based in part on its 1926 contract with the government. In that contract the government agreed to deliver water to TCID for distribution to Project water users. Individual water users represented by TCID in this litigation have their own contract rights. Some water users have contracts directly with the government, under which the government promises to deliver certain quantities of water. Other water users' rights are based on contracts with TCID which, at least in some cases, are approved by the government. *See* R. 1142-48. Though Project water users' rights originate from contracts, this does not mean that they have no ownership interest in them. *See Ickes v. Fox*, 300 U.S. 82, 57 S.Ct. 36, 81 L.Ed. 388 (1937); Trelease, *Reclamation Water Rights*, *supra*, 32 Rocky Mt.L.Rev. 477-81; 2 *Waters and Water Rights*, *supra*, § 117.3, at 176-77. Nevertheless, it is clear that the water users represented by TCID trace their rights to the contracts mentioned above.

III. Ratification.

The defendants argue that Congress has ratified the *Orr Ditch* decree, and so it must be given preclusive effect. The district court found that Congress ratified the taking of the fishery, primarily by passing the Washoe Project Act of 1956, 43 U.S.C. § 614 *et seq.* There Congress noted the deterioration of the Pyramid Lake fishery "due in large measure to the construction by the Federal Government of the Newlands Project." The Washoe Project Act authorized efforts to restore the fishery. The district court held that this (1) confirmed "Congress' awareness of past acts;" and (2) ratified those acts "by its attempts to restore the fishery."

Ratification occurs where Congress adopts prior acts with "full knowledge of the relevant facts." *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 102-03 n.28 (9th Cir. 1970). *See Shoshone Tribe v. United States, supra,* 299 U.S. 476, 57 S.Ct. 244, 81 L.Ed. 360; *United States v. Creek Nation, supra,* 295 U.S. 103, 55 S.Ct. 681, 79 L.Ed. 1331. The legislative history of the Washoe Project Act shows Congress was aware: (1) that the fishery had deteriorated; and (2) the federal government's development of the Newlands Project was largely the cause of the deterioration. There is no indication that Congress knew that the Tribe might have a reserved water right for the fishery or that the right was extinguished in *Orr Ditch.* Further, nothing in the record or the legislative history suggests that by authorizing efforts to restore the fishery Congress intended to sanction federal actions that had contributed to the fishery's destruction. Accordingly, we

hold Congress has not ratified the government's actions in the *Orr Ditch* proceedings.

IV. Other Arguments.

The parties make a number of other arguments which were not accepted by the district court. We deem it unnecessary to discuss them in detail. We reject the Tribe's argument based on section 16 of the Indian Reorganization Act. We cannot agree that the government's handling of the Reservation's interests in the *Orr Ditch* case constituted a "disposition" of tribal assets within the meaning of that section. See discussion at 1300 *supra*. We also reject TCID's argument that the Tribe is bound by the *Orr Ditch* decree because in 1974 it sought to enforce that decree against the defendants. TCID's argument is based on the much-critized former Equity Rule 37. *See* 3B *Moore's Federal Practice, supra*, ¶ 24.16[1] at 591; *Spiller v. St. Louis & San Francisco R.R.*, 14 F.2d 284 (8th Cir. 1926), *rev'g North American Co. v. St. Louis & San Francisco R.R.*, 288 F. 612 (D.Mo.1922). No comparable provision was included in the revised Federal Rules of Civil Procedure. *Compare Spangler v. United States*, 415 F.2d 1242 (9th Cir. 1969). We see no inequity in permitting the Tribe to seek to enforce the *Orr Ditch* decree against the defendants while also seeking additional water rights in this proceeding. By intervening the Tribe did not assert the validity of the *Orr Ditch* decree against itself. *Compare Davis v. Wakelee*, 156 U.S. 680, 691, 15 S.Ct. 555, 559, 39 L.Ed. 578 (1895). Rather, it attempted to hold the defendants to rights confirmed in the *Orr Ditch* decree. This is not inconsistent with its claim for additional waters. *See Embry v. Palmer*, 107 U.S. 3, 2 S.Ct. 25, 27 L.Ed. 346 (1882).

V. Conclusion.

We conclude that the *Orr Ditch* proceedings withstand the plaintiffs' collateral attack, in the main. Notwithstanding the government's questionable representation of the Tribe's interests, there is sufficient reason for us to give the decree preclusive effect with respect to the *Orr Ditch* defendants, their successors, and subsequent appropriators who reasonably relied on the decree.

We reach a different conclusion with respect to the Truckee-Carson Irrigation District. Its interests were represented by the government in the *Orr Ditch* proceedings in such a way that there was no opportunity to adjudicate its interests as against the Tribe's. We therefore remand this case to the district court to adjudicate priorities between those interests.

On remand the district court must determine whether the Tribe is entitled to a water right for its fishery. We express no opinion on that question. If the Tribe is adjudged to have such a right, it is of course limited to a quantity of water "necessary to fulfill the purposes of the reservation, no more." *Cappaert v. United States, supra*, 426 U.S. at 141, 96 S.Ct. at 2071. And, of course, any additional water due the Tribe must come from water rights decreed to the government in *Orr Ditch*. Neither the Tribe nor the government may expand its water rights beyond the limits of government rights decreed in the original proceeding. We also believe it important to bear in mind the nature of the right the Tribe seeks in this litigation. As the Tribe points out in its brief:

> "[The fishery right] does not require the delivery of fixed quantities each and every day, month, season or year. Unlike the other kind of water right, the water required for fishery purposes will have its least impact in dry years when water is most scarce. In dry years the water would not do [the fishery] any good."

Tribe's Opening Brief at 21-22.

Given this flexibility in the right the Tribe seeks, we are hopeful that on remand the district court and the parties can formulate a solution that will minimize hardships on all water users.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Appendix B

SCHROEDER, Circuit Judge, concurring in part and dissenting in part:

I concur in all of the majority opinion except that portion which permits a partial reopening of the *Orr Ditch* litigation to consider the claim of the Tribe against the Truckee-Carson Irrigation District. My partial dissent is with respect and regret, for the fate that has befallen the once beautiful Pyramid Lake is indeed sorrowful.

I dissent because the majority opinion creates an exception to the principles of res judicata applicable to general water adjudications, and the effect of today's ruling may have disruptive repercussions beyond the shores of Pyramid Lake.

The majority opinion, correctly in my view, rejects the broad contention of the government that its own, belatedly perceived, conflict of interest in representing both the Irrigation District and the Tribe requires the *Orr Ditch* decree to be reopened completely. In the bygone era in which irrigation and reclamation ranked supreme, the conflicting relationship between those interests and possible other reserved Indian water rights was not clearly perceived. The majority properly recognizes, as the district court found, that there could have been no public perception of any impropriety in the government's conduct of this litigation which would preclude reliance upon the decree. *See* Restatement (Second) of Judgments § 86 (Tent. Draft No. 2, 1975).

The majority's limited reopening is more narrowly perched upon the principle of "adverseness under the pleadings," a concept most commonly applied to co-parties

in tort litigation. The majority applies that concept here because the claims of the Tribe and TCID were both set forth in the government's complaint. The majority concludes that those claimants are bound only by matters which were actually litigated, and not as to any claims which could or should have been determined in that litigation.

This action, however, as the district court found and the majority accepts, was intended by all concerned to be a "general all inclusive water adjudication suit which sought to adjudicate all rights and claims in and to waters of the Truckee River and its tributaries . . . to the end that its decree would determine the relative rights of the parties thereto." The government filed the action in order to determine all prior rights to the water and to establish the amount of water available to TCID. In such litigation, the fact that claimants may be denominated plaintiffs or defendants has no effect on the application of res judicata. All are adverse to each other.

This principle has been repeatedly observed by courts of the western United States in dealing with similar adjudications. For example, the Idaho Supreme Court in *Morgan v. Udy*, 58 Idaho 670, 79 P.2d 295 (1938), was faced with the contention that parties to an adjudication had not been adversaries and thus principles of collateral estoppel as opposed to res judicata applied. The court quoted from *Frost v. Alturas Water Co.*, 11 Idaho 294, 301, 81 P. 996, 998:

> '. . . in the settlement of cases of this character every user of water on the stream and all of its tributaries in litigation are interested in the final award *to each*

> *claimant.* * * * *Every claimant of the water* of either stream * * * *is interested in a final adjudication of all* the claimants of all the waters that flow to the claimants at the lower end of the stream after its junction. In other words, in my view of the question presented by the demurrer, it matters but little who are plaintiffs and who are defendants in the settlement of cases of this character; the real issue being who is first in right to the use of the waters in dispute.' (Italics ours.)

58 Idaho at 681, 79 P.2d at 299. In an equitable quiet title action very similar to the *Orr Ditch* litigation, the Nevada Supreme Court decided whether non-appealing defendants were "adverse" parties entitled to be served with a notice of appeal. *Pacific Live Stock Co. v. Ellison Ranching Co.*, 52 Nev. 279, 286 P. 120 (1930). The court concluded that they were "adverse," stating:

> In a suit to quiet title to water rights, such as this, the main purpose is to determine the respective rights of the parties to the use of the water. A decree which leaves the controversy between the parties unsettled, unadjudicated, undetermined, and subject to future litigation, defeats the very purpose for which the action is brought. 3 Kinney, Water Rights (2d ed.) § 1557.

Id. at 296, 286 P. at 123.

The majority decision here, of course, rests not only upon the form of the pleadings but upon the fact that the government, at least formally, was representing both the Irrigation District water users and the Tribe. This, however, as we all agree, was not generally understood to have involved any impropriety during the course of the *Orr*

Ditch litigation. The users of the Truckee-Carson Irrigation District waters, like the *Orr Ditch* defendants, have relied on the finality of the *Orr Ditch* decree for nearly two generations. The majority does not suggest, nor did the district court find, that the TCID users were any more aware of improprieties in the government's conduct than the other users who were parties to the action.

As the majority points out, the hardship of today's ruling on TCID may be eased by the availability of other remedies. In such circumstances, today's ruling may well be viewed as a fair and equitable redress for the loss of fishery rights and the damage done to Pyramid Lake. However, the applicability of today's ruling to other water adjudications involving Indian interests was not briefed in this case and is not known to this panel. I understand today's ruling to apply only to a situation in which the government, in the complaint, asserted claims on behalf of an Indian tribe as well as other water users who were not parties to the litigation. No claim has been made that this situation is unique.[1]

The underlying conflict between pursuit of reclamation interests and reserved Indian rights has been the sub-

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[1]Many water adjudications undoubtedly lie outside the scope of today's ruling. For example, the *Kent* decree, *Hurley v. Abbott*, No. 4564 Decree, Dist.Ct.3rd Judicial Dist., Maricopa Co. (1910) underlies the water distribution in Central Arizona. That decree has been cited along with the *Orr Ditch* decree as an example of conflict of interest. Federal Protection of Indian Resources, Hearings Before the Subcomm. on Elections of the Senate Judiciary Comm., 92nd Cong., 1st Sess. (1971) (statement of W. H. Veeder). It is not within the scope of today's decision, however, since the government there made all land owners within the district parties defendant.

ject of calls for congressional action. *E. g.*, Chambers, Discharge of the Federal Trust Responsibility to Enforce Legal Claims of Indian Tribes: Case Studies of Bureaucratic Conflict of Interest, 91 Cong., 2d Sess. (Comm. Print 1970) Study of Administrative Conflicts of Interest in the Protection of Indian Natural Resources, Subcomm. on Admin. Prac. and Procedure of the Senate Comm. on the Judiciary; Veeder, Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development, 91 Cong., 1st Sess. (Comm. Print 1969) Toward Economic Development for Native American Communities, Subcomm. on Economy in Government of the Joint Economic Comm. In my view that approach is preferable to one which erodes long standing principles of finality in water adjudications.

Appendix C

United States Court of Appeals
For the Ninth Circuit

Nos. 78-1115/1493

United States of America,
Plaintiff-Appellant,
and
Pyramid Lake Paiute Tribe of Indians,
Plaintiff-Intervenor-Appellant,

vs.

Truckee-Carson Irrigation District, State of Nevada, Sierra Pacific Power Company, City of Washoe, and Washoe County Treasurer, Trustee, Albert A. Alcorn, and Approximately 17,000 Other Individually Named Persons, Firms, Partnerships, and Corporations,
Defendants-Appellants.

[Filed Jan. 5, 1982]

Appeal from the United States District Court
for the District of Nevada

Before: TUTTLE*, SKOPIL, and SCHROEDER,
Circuit Judges

*The Honorable Elbert Parr Tuttle, Senior Circuit Judge, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

The opinion in the above-named case, currently published at 649 F.2d 1286, is ordered amended as follows:

1. In the second complete paragraph at 649 F.2d at 1294, the sentence: "Section 4 of that Act declared that 'restoration of the Pyramid Lake Trout Fishery to its full potential value is deemed to be of national interest and importance" is ordered deleted. The following is ordered substituted: "The House Report of that Act declared that 'restoration of the Pyramid Lake Trout Fishery to its full potential value is deemed to be of national interest and importance. H.R. Rep. No. 2055, 84th Cong., 2d Sess. 4-5, *reprinted in* 1956 U.S. Code Cong. & Ad. News 3755, 3758."

2. At the end of the third complete paragraph at page 1294, the citation to 15 C.F.R. § 17.11 at 87-88 (1977) is ordered changed to 50 C.F.R. § 17.11 at 87-88 (1977).

3. At page 1295, at the end of the paragraph which begins on Page 1294, the last word in the paragraph is ordered changed to "1961" from "1969".

4. At page 1299, the last citation sentence in the paragraph beginning on page 1298 is ordered deleted. The correct citation is "*See* 2 *Waters and Water Rights* § 116.1 at 162 n.20 (R. Clark ed. 1967)."

5. At the end of footnote 13 at 649 F.2d at 1304, the following should be added:

> "The level of scrutiny set forth in Restatement Second § 86(e) is appropriate here. The Federal-Indian relationship is long established in the law and involves fiduciary obligations. *See e.g., Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 17 (1931); *Navajo Tribe v. United States,* 364 F.2d 320 (Ct. Cl. 1966). In

class actions, by contrast, the relation between the class and the class representative is transitory. Outside the context of the action, there is no legal relation. The same is true in actions by most government representatives, where the only relation is between a citizen and the government agency, entailing no legal relation. *See, e.g., Consumers Union v. Consumer Product Safety Comm.*, 590 F.2d 1209 (D.C. Cir. 1978); *Southwest Airlines Co. v. Texas Int'l Airlines, Inc., supra*, 546 F.2d at 84."

6. At the end of the sentence beginning on page 1307 and ending on page 1308, the following is ordered added:

"If the *Orr Ditch* defendants were aware of the government's failure to fulfill its responsibility to the Tribe, and therefore did not reasonably rely on that representation, giving preclusive effect the decree would deny the Tribe due process. If the *Orr Ditch* defendants were without knowledge, enforcing the decree would not contravene due process."

The following sentence should begin a new paragraph.

7. The following is ordered added to the end of the first complete paragraph on page 1309:

"Accordingly, the Tribe's water right cannot be greater than the rights decreed to the government in *Orr Ditch*. The government's priority is superior to the rights of subsequent appropriators. Yet the *Orr Ditch* decree defines the maximum limits of any rights the Tribe may establish on remand. Subsequent appropriators will be no better nor worse off if the Tribe takes more water than they were when TCID was taking its full share."

8. At page 1313, the first word of the fourth line of the indented quotation in the left-hand column should be "every" rather than "the".

9. New footnote 20 is ordered added to the opinion. The signal to the footnote should be placed at the end of the second complete paragraph on page 1309. Subsequent footnotes are ordered renumbered. New footnote 20 will state:

> "Antagonistic parties are not necessarily adverse parties. Adversity is a legal concept. It exists only if parties have had an opportunity of litigating between themselves the correctness of a determination which is the basis of the judgment between them. Restatement of Judgments, *supra*, § 82, Comment a. The formal requirements of setting up adversity serve the purpose of notifying the parties and the court that a binding judgment between the parties is intended. These formal requirements were not followed here. Neither the court nor the government nor the Tribe nor TCID was ever put on notice that a binding judgment was intended between TCID and the Tribe. Such notice might have suggested to the Tribe that it must seek to intervene, and to the court that intervention might be proper. *See New Mexico v. Aamodt, supra,* 537 F.2d at 1106. Because of the important function served by the adversity requirement in this situation, we decline to suspend its application. The fact that TCID and the Tribe may have had antagonistic interests is irrelevant."

Appendix D

United States Court of Appeals
For the Ninth Circuit

No. 78-1115/1493

United States of America,
Plaintiff-Appellant,
and
Pyramid Lake Paiute Tribe of Indians,
Plaintiff-Intervenor-Appellant,

vs.

Truckee-Carson Irrigation District, State of Nevada, Sierra Pacific Power Company, City of Washoe, and Washoe County Treasurer, Trustee, Albert A. Alcorn, and Approximately 17,000 Other Individually Named Persons, Firms, Partnerships, and Corporations,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Nevada

[Filed March 11, 1982]

ORDER

Before: TUTTLE,* SKOPIL, and SCHROEDER,
Circuit Judges

*The Honorable Elbert Parr Tuttle, Senior Circuit Judge, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

The panel has voted to deny the petitions for a panel rehearing. Judges Tuttle and Skopil have voted to deny a panel rehearing. Judge Schroeder would grant a panel rehearing.

The full Court has been advised of the suggestion for rehearing en banc. A judge in active service requested that a vote be taken on the suggestion for rehearing en banc, pursuant to Fed.R.App.P. 35(b). A vote of all active judges was taken and a majority voted against en banc rehearing.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Judges Anderson and Hug took no part in the consideration or disposition of this appeal.

Appendix E

In the United States District Court
For the District of Nevada

Civil No. R-1987-JBA

United States of America,
Plaintiff,
and
Pyramid Lake Paiute Tribe of Indians,
Plaintiff-Intervenor,

vs.

Truckee-Carson Irrigation District, State of Nevada,
Sierra Pacific Power Company, City of Reno,
City of Sparks, County of Washoe and
Washoe County Treasurer, Trustee,
Albert A. Alcorn, and approximately 17,000
other individually named persons, firms,
partnerships and corporations,
Defendants.

[Filed Dec. 12, 1977]

MEMORANDUM DECISION

This memorandum will attempt to amplify and expound upon several areas of the court's reasoning underlying its ultimate Findings of Fact and Conclusions of Law, filed contemporaneously herewith, and also to meet and answer several of the principal contentions raised by plaintiff and the intervenor.

I.

THE RECLAMATION ACTS

As stated in the Findings of Fact and Conclusions of Law, this court places primary reliance upon the passage of the 1902 Reclamation Act. In this regard, *Henkel v. United States*, 237 U.S. 43 (1915), is enlightening. In *Henkel*, the United States brought an action in ejectment seeking to recover certain lands in the Blackfeet Indian Reservation. These lands were to be used in connection with the proposed St. Mary Reservoir of the United States Reclamation Service. The defendants were members of the Piegan Tribe and occupied the lands and had built improvements thereon. In 1906 the defendants executed a document in which they undertook to relinquish all claims to the lands in question. The conditions of this surrender were that the defendants were to be paid $7,500.00 for their improvements and would be subsequently allowed to select allotments of equal area from the unoccupied lands of the Blackfeet Indian Reservation. In 1907 the defendants were paid $7,500.00. In their answer the defendants alleged that the allotting officers had refused to allot the lands selected by the defendants and that, under protest, the defendants had been allotted lands elsewhere, which lands they offered to surrender if the lands selected by them would be allotted to them.

In the words of the court, the defendants contended:

> " . . . that no statute of the United States has conferred authority upon the government or its officers to acquire the lands described by the relinquishment from the Henkels, as above set forth. Such action, it is contended, would amount to an act of bad faith

> upon the part of the government toward these Indians in view of their established right in these lands; and to permit the reclamation statute of 1902 to have such effect, it is insisted, would be virtually to permit it to repeal previous acts of Congress disposing of lands for the benefit of the Indians."

In order to answer this contention, the court reviewed "the previous status of the Indians and what Congress has undertaken to do by legislating in their behalf." After reviewing the Allotment Act of February 8, 1887, the court focused upon an agreement made with the Indians on September 28, 1895, and approved by the Act of June 10, 1896. Under this agreement it was provided that no allotments of land would be made on the Blackfeet Reservation and that the land would be held by the Indians as a communal grazing ground. The agreement also provided that any Indian member could file a description of land fenced in by him which would give that member the right to take such land when allotments were made. The agreement also contained a provision recognizing a reserved right of the government to use the lands upon compensation being made therefor for certain described public improvements.

It was under this 1895 agreement that the defendants had occupied their lands when the Reclamation Act of 1902 was passed. After reviewing the broad powers delegated to the Secretary of the Interior under the Act, the court stated:

> "The reclamation projects undertaken by the government are very extensive and cover many states; and they must involve in their construction the flooding of

lands in connection with dams designed to hold water for such purposes; and must necessarily include much territory which is included in Indian reservations. This situation was of course well known to Congress when it passed the reclamation act, and we cannot doubt, in view of the broad authority conferred by §§ 7 and 10, above quoted, that it was the purpose of Congress to give the Secretary of the Interior the right to acquire such rights as are here involved, when necessary for reclamation purposes. In carrying out the purposes of the act, the Secretary of the Interior is authorized to acquire any rights or property necessary for that purpose, and to acquire the same either by purchase or by condemnation. He is specifically authorized to perform any and all acts necessary and proper for the purpose of carrying into effect the provisions of the act. Authority could hardly have been conferred in more comprehensive terms, and we do not believe that it was the intention of Congress, because of the Indians right of selection of lands under the circumstances here shown, to reserve such lands from the operation of the act. To do so might defeat the reclamation projects which it was evidently the purpose of Congress to authorize and promote."

This recognition by the Supreme Court, in 1915, of the overriding national importance of the Reclamation Act confirms this court's belief that it was the passage of that Act that necessarily created the conflict of purposes in the Department of the Interior. As a result of the passage of the Reclamation Act, the Secretary instituted Orr Ditch and the evidence supports the finding that the primary purpose of Orr Ditch was to secure the water rights for the reclamation project. Once instituted, the United States,

as guardian for the Pyramid Lake Paiute Indians, also sought to secure water rights for the Indians under the reserved rights doctrine.

This representation of the Indians by the United States was in full accord with *Heckman v. United States,* 224 U.S. 413 (1912). In *Heckman* the United States brought an action seeking to cancel certain conveyances, executed by members of the Cherokee Tribe, of lands allotted to them in severalty. The statute under which the allotments were made, Act of July 1, 1902, contained a provision that the allotted lands were inalienable for a period of twenty-five years. It was not disputed that the conveyances made were in violation of this provision. The argument was made that there was a defect of parties because of the Indian grantors' absence from the case. The Supreme Court met this contention with the following language:

> "The argument necessarily proceeds upon the assumption that the representation of these Indians by the United States is of an incomplete or inadequate character; that although the United States, by virtue of the guardianship it has retained, is prosecuting this suit for the purpose of enforcing the restrictions Congress has imposed, and of thus securing possession to the Indians, their presence as parties to the suit is essential to their protection. This position is wholly untenable. There can be no more complete representation than that on the part of the United States in acting on behalf of these dependents, whom Congress, with respect to the restricted lands, has not yet released from tutelage. Its efficacy does not depend upon the Indians acquiescence. It does not rest upon convention, nor is it circumscribed by rules which govern private relations. It is a representation which traces its source

> to the plenary control of Congress in legislating for the protection of the Indians under its care, and it recognizes no limitations that are inconsistent with the discharge of the national duty."

This language of the court, issued just one year before Orr Ditch was commenced, manifestly authorized the United States to represent the Indians in the Orr Ditch case.

The United States was therefore properly in the case in its own capacity seeking water rights for the benefit of the reclamation project and in its representative capacity for the Indians. This situation squarely presented the Department of the Interior, the Bureau of Reclamation and the Bureau of Indian Affairs, with the problem of having to deal with a limited quantity of water out of which to satisfy two claims—the project rights and the Indians' rights. Faced with this apparent and foreseeable conflict of purposes, the Secretary of the Interior necessarily looked to his delegation of powers from Congress. Two provisions of the Reclamation Act of 1902 delegated to the Secretary very broad powers. Section 7 of that Act provided, in pertinent part:

> "Sec. 7. That where in carrying out the provisions of this Act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, . . ."

Section 10 of the same Act provided:

> "Sec. 10. That the Secretary of the Interior is hereby authorized to perform any and all acts and to make

> such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect."

Still later, by the Act of April 21, 1904, the Secretary of the Interior was delegated powers specifically referring to the Pyramid Lake Indian Reservation. Section 16 of that Act provides, in pertinent part:

> "Sec. 26. That in carrying out any irrigation enterprise which may be undertaken under the provisions of the reclamation act of June seventeenth, nineteen hundred and two, and which may make possible and provide for, in connection with the reclamation of other lands, the reclamation of all or any portion of the irrigable lands on the Pyramid Lake Indian Reservation, Nevada, the Secretary of the Interior is hereby authorized to reclaim, utilize, and dispose of any lands in said reservation which may be irrigable by such works in like manner as though the same were a part of the public domain; *Provided,* That there shall be reserved for and allotted to each of the Indians belonging on the said reservation five acres of irrigable lands. The remainder of the lands irrigable in said reservation shall be disposed of to settlers under the provisions of the reclamation Act: . . ."

The delegation of these powers to the Secretary of the Interior evidences a determination, made by Congress, that if lands, and specifically by the Act of April 21, 1904, lands of the Pyramid Lake Indian Reservation, were needed in order to carry out the purposes of the reclamation act, such lands were to be acquired by the Secretary. It was Congress' determination that Indan lands, if necessary to be acquired to carry out the purposes of the Recla-

mation Act, were secondary when conflicting with the purposes of the Reclamation Act. Congress' authority to deal with Indian lands is beyond question. As stated in *United States v. Southern Pacific Transp. Co.*, 543 F.2d 676 (9th Cir. 1976):

> "Congress has plenary authority to control use, grant adverse interests or to extinguish the Indian title." 543 F.2d at 687.

In this case, Congress, by passing the Reclamation Acts of 1902 and 1904, delegated to the Secretary of the Interior that authority to deal with Indian lands when such were necessary to carry out the purposes of the Reclamation Act.

It should also be emphasized that the establishment of the Pyramid Lake Indian Reservation by Executive Order did not thereby convey to the Indians any compensable interest in the lands. *Sioux Tribe v. United States,* 316 U.S. 317 (1942). The extinguishment of the alleged fishery right did not subject the United States to any obligation of paying compensation. Congress has recognized the loss of the fishery and recompensed the Indians for this loss through various acts and appropriations as indicated in Finding No. 30 of the Findings of Fact and Conclusions of Law. Specifically, this recognition was best expressed in the passage of the Washoe Project Act, 43 U.S.C. § 614, et seq. In 43 U.S.C. § 614(c) Congress included "facilities to permit increased minimum water releases from Lake Tahoe and restoration of the Pyramid Lake fishery." The legislative history of the Act confirms this recognition. In House Report No. 2055 the Committee on Interior and Insular Affairs states:

> "The present condition of Pyramid Lake is due in large measure to the construction by the Federal Government of the Newlands project, one of the first Federal reclamation projects, and by irrigation works for the Pyramid Lake Indian Reservation; yet, no compensatory measures to maintain the fishery of the lake were ever taken by the Federal Government. It is hoped that, through establishment of a fish hatchery, increase of flows in the Truckee River and channel improvements at the mouth of the river, that a trout fishery can be restored. Restoration of the Pyramid Lake trout fishery to its full potential value is deemed to be of national interest and importance, because, among other things, of the adverse results of previous Federal participation in the development of the waters affecting the fishery of the lake."
>
> 1956 U.S. Cong. & Admin. News, p. 3758.

This language confirms Congress' awareness of past acts and its ratification of those acts by its attempts to restore the fishery.

The language of Judge Chambers in his concurrence in *United States v. Ahtanum Irrigation District*, 236 F.2d 321, 342 (9th Cir. 1956) seems to be especially appropriate. He states:

> "Even though they may have known of the Winters decision, those who have a duty to act today may make mistakes which, in the course of future events, may indicate bad judgment. If the 1908 agreement today works a great injustice, I think that it is for Congress to correct the unfairness if such there be by developing other irrigable land for the Indians involved."

II.

THE INDIAN NON-INTERCOURSE ACT

25 U.S.C. § 177, otherwise known as the Non-Intercourse Act, provides in pertinent part:

> "§ 177. Purchases or grants of lands from Indians. No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. . . ."

From this statute the Tribe argues that since Indian title can be extinguished only with the consent of Congress, then a final judgment adjudicating Indian property rights adverse to the Indians' interest which may subsequently be found to be erroneous should not be given res judicata effect.

DISCUSSION

From the language of the Act, it would appear that the Tribe would have to prove at least four things in order to render the Act applicable:

1. that there has been a "purchase, grant, lease, or other conveyance"
2. "of lands"
3. "from any . . . tribe of Indians,"
4. which was without Congress' consent.

Regarding the first element, whether there has been a "conveyance" the first question to be decided is the type or source of actions that are alleged to be a "conveyance." It would appear that the *Orr Decree* was the effective "conveyance" of the right. Underlying the *Orr Decree* was

the Truckee River Agreement entered into by the parties. The determinative question therefore is whether the Orr Decree and/or the Truckee River Agreement was a "conveyance" within the meaning of the Act.

The best authority on this question is the Ahtanum duet of cases. The first case, *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), was a suit brought by the United States as trustee for the Indians to quiet title to the Indians' right to use the waters of the Ahtanum Creek which allegedly were reserved by treaty. The court below held that the Treaty of June 9, 1855, which set aside the Indian Reservation for the Yakimas, did not reserve any water rights for the Indians. The Court of Appeals reversed this holding, saying that the Treaty did reserve such water rights by reason of *Winters v. United States*, 207 U.S. 564 (1908). The question then became what was the quantity of water rights reserved. In this regard the crucial question concerned the validity of a 1908 agreement between Chief Engineer Code and a group of white settlers. Code had been instructed to go to the reservation for the purpose of bringing about a settlement of the rights to the use of the Ahtanum Creek. The agreement reached was that the white settlers were to get 75% of the flow and the Indian users would get the remaining 25% of the flow. The agreement was signed by Code on behalf of the United States and was approved by the First Assistant Secretary of the Interior. The crucial question came down to whether the Secretary had the power to make this agreement. The Court, after reviewing the statutory powers of management vested in the Secretary, held that the above agreement "was the sort of thing which the Sec-

retary was authorized to do by the grant of general powers of supervision and management, he therefore had the power to make the 1908 agreement." *supra*, p. *338*. The court reversed the dismissal of the case and remanded to determine and adjudicate the extent of the rights of the respective parties during which the defendants must be required to show and disclose their rights, titles and priorities.

On remand, the case was referred to a special master who concluded that the 1908 agreement was an effective conveyance of 75% of the waters of Ahtanum Creek. The master also construed the Court of Appeals language to mean that the rights of the defendants were as great as their needs and therefore concluded that the government had turned over en masse the 75% of the flow unrelated to any particular parcel of land and unrelated to proof of water rights under Washington law.

In dealing with the conveyance question, the Court of Appeals in the second case, *United States v. Ahtanum Irrigation District*, 330 F.2d 897 (9th Cir. 1964), stated:

> "This conclusion of the master that the agreement of 1908 operated as an instrument of conveyance whereby certain waters held by the United States in trust for the Indian tribe were conveyed to the other parties to the agreement, was rejected by the district judge when the master's report came up before him on exceptions thereto. The judge held that the agreement was neither a conveyance nor a contract to convey an interest in the water rights of the Ahtanum Creek saying: 'In my opinion the most reasonable characterization to be placed upon the 1908 agreement is that it was an agreement whereby the parties settled a dis-

> pute as to their respective water rights in the creek and as such is similar in legal effect to the well known 'boundary line agreement.' "
>
> • • •
>
> "In thus disagreeing with the master's version of the 1908 agreement the judge was eminently correct."

Applying the above to our case, it is apparent that the *Orr Decree* was based in part upon the Truckee River Agreement (TRA). The TRA was entered into by the United States on behalf of the Tribe, and was approved by the Interior Department and the Bureau of Indian Affairs, with legal advice. In contrast, the 1908 Ahtanum agreement was entered into without legal advice and without consulting the Indians. The TRA was also an agreement which "settled a dispute as to their respective water rights" in the Truckee River. If the 1908 *Ahtanum* agreement is not a "conveyance," it is impossible to conceive that there was a "conveyance" in this case.

Tribal counsel, in his final argument, may have provided a little insight into the proper definition of a "conveyance" when used under the Non-Intercourse Act. In discussing the Motion to Strike Affirmative Defenses, Mr. Pelcyger stated:

> "So my answer to that question [whether there was a conveyance] is that we are not contending that there has been any conveyance as that term is ordinarily used, but rather that the statute which uses the term conveyance bars the kinds of affirmative defenses that are the subject of the motion to strike." [p. 9809]

It must also be pointed out that in *Ahtanum I* the court upheld the power of the Secretary to enter into the agree-

ment based upon the general powers of management and supervision. In our case the power of the Secretary to enter into the TRA is not based upon general powers, but rather a specific grant found in § 7 of the Reclamation Act of 1902, authorizing the Secretary to acquire any rights or property when the same becomes necessary in carrying out the provisions of the Act and even more specifically in the Act of April 21, 1904, § 26, of which specifically refers to the Pyramid Lake Indian Reservation.

Dealing with the second requirement, "of lands," the Tribe cites *North Side Canal Co. v. Twin Falls Canal Co.*, 12 F.2d 311 (D. of Idaho), in which the court stated:

> " 'Land,' in a statute of this general nature, must necessarily be given a broad and comprehensive meaning. "Land,' in such sense, includes water upon the land, and water claimed to be appropriated for use in the development, by irrigation, of the land."

The Tribe also cites *Holmes v. United States,* 53 F.2d 960 (9th Cir. 1931), in which the court stated:

> "The primary meaning of the word 'land' at common law is 'any ground, soil or earth whatsoever; as arable, meadows, pastures, woods, waters, marshes, furzes and heath.' 2 Blackstone, Com. 18."

However, it could also be argued that since § 177 was derived from the Act of June 30, 1834, long before the concept of the *Winters* doctrine was recognized, that Congress was concerned with the typical situation wherein the backward, unschooled Indians were being taken advantage of by the white men in trading or selling their lands for inadequate prices. The concept that the Indians also were reserved sufficient water to go along with their lands

was not conceived of until *Winters v. United States, supra,* which was decided in 1908.

The Tribe also has difficulty in meeting the third requirement, that the conveyance be "from any Tribe of Indians." The only right possessed by the Indian was their right of occupancy in the lands, which is a permissive right granted by the government. It must also be remembered that in the early 1900's there was indeed a question as to whether Indians on an executive order reservation possessed the Winters rights. The fee of the land remained in the United States and by virtue of the Reclamation Act of 1902, the Secretary of the Interior was given specific authority to perform any act necessary to carry out the provisions of that Act. Since the fee remained in the United States and the Indians had no compensable interest in their executive order reservation, the right and authority to deal with the lands was vested in the Secretary, not the Indians.

The fourth requirement is that the conveyance be made without consent of the United States. In *United States v. Candelaria*, 271 U.S. 432 (1926), an action was brought by the United States seeking to quiet title to certain lands alleged to be owned by the Pueblos. The suit was brought on behalf of the Indians as wards of the United States. The defendants denied the wardship and set up in bar two decrees rendered in prior suits brought by the Pueblos to quiet title in the same lands. The United States responded that it was not a party to either suit, that it had not authorized either suit and therefore it was not bound by the two earlier decrees. The court, after reviewing the status

of the Pueblos and their relationship with the United States, held that the United States was not barred by the earlier decrees. The court stated:

> "The Indians of the pueblo are wards of the United States and hold their lands subject to the restriction that the same cannot be alienated in any wise without its consent. A judgment or decree which operates directly or indirectly to transfer the lands from the Indians, where the United States has not authorized or appeared in the suit, infringes that restriction. The United States has an interest in maintaining and enforcing the restriction which cannot be affected by such a judgment or decree."

The court also noted that the United States had employed and paid a special attorney to represent the Pueblos. The court thereby qualified its holding in stating:

> " . . . if the decree was rendered in a suit begun and prosecuted by the special attorney so employed and paid, we think the United States is as effectually concluded as if it were a party to the suit."

In our case the United States instituted, authorized and appeared and therefore by such actions the United States has consented to the consequences of the litigation. It should also be pointed out that the *Candelaria* court cited and referred to the Non-Intercourse Act, although it was not relied upon.

CONCLUSION

The two most critical elements found to be missing or not supported by the evidence are that there was a "conveyance" and that such "conveyance" was done without

the consent of the United States. The rendering of the *Orr Decree* based upon the Truckee River Agreement which settled the parties' respective rights in the waters of the Truckee and its tributaries is simply not a "conveyance" as that term is used in the Act, and the United States, by appearing in the suit, has thereby consented to the consequences of the litigation.

III.

THE INDIAN REORGANIZATION ACT

Section 16 of the Indian Reorganization Act, 25 U.S.C. § 476, provides in pertinent part:

> "In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; . . ."

The Indian Reorganization Act became law on June 18, 1934. On December 15, 1934, the Pyramid Lake Paiute Tribe voted to accept the Indian Reorganization Act. On December 14, 1935, the Pyramid Lake Paiute Tribe organized and adopted a constitution under Section 16 of the Indian Reorganization Act which contained similar provisions as those outlined in Section 16 quoted above. This constitution was approved by the Secretary of the Interior on January 15, 1936. The Tribe contends that, under the unique circumstances of this case, to give res

judicata effect to a decree that has been approved by government officials but without the Indians' consent violates the policy expressed in the Indian Reorganization Act.

Section 16 of the Indian Reorganization Act was discussed in *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949). In *Hynes* the Secretary of the Interior, on May 22, 1943, issued Public Land Order 128 which created the Indian reservation in question and which included the adjacent tidelands and coastal waters along the entire shore of the reservation. The principal basis for this Order was § 2 of the Act of May 1, 1936, 49 Stat. 1250, c 254, which was passed to extend the benefits of the Indian Reorganization Act to Alaska and to provide for the designation of Indian reservations in Alaska. In 1946 the Secretary of the Interior amended the Alaska Fisheries General Regulations by adding a subsection which closed the waters in the reservation to commercial salmon fishing, but which made an exception for fishing by natives and their licensees. As a result of this regulation, various fish canning companies brought an action against the Regional Director for Alaska, seeking to permanently enjoin the exclusion of their fishermen, contending that neither the regulation nor the Public Land Order had legally closed the fishing in the coastal waters.

Pertinent to our inquiry, the court first dealt with the validity of Public Land Order 138. In its inquiry the court focused upon the scope of the power delegated to the Secretary of the Interior by the Indian Reorganization Act of June 18, 1934 [referred to as the Wheeler-Howard Act]

and § 2 of the Act of May 1, 1934. It was contended that the Secretary's designation of the reservation was a permanent disposition of the property. The court held that the power delegated to the Secretary under these Acts, although authorizing his inclusion of the waters in the Karluk Reservation, such powers did not include the "power to convey any permanent title or right to the Indians in the lands or waters of the Karluk Reservation." This view was in accord with the status of the Karluk Reservation and Executive Order Reservations in general. The court stated:

> "An Indian reservation created by Executive Order of the President conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President. Such rights may be terminated by the unilateral action of the United States without legal liability for compensation in any form even though Congress has permitted suit on the claim. [citations omitted]"

The court also noted that, under the language of § 16 of the Indian Reorganization Act, the argument could be made that the designation of a reservation is a non-revocable grant. In rejecting this contention, the court stated:

> "We think, however, in view of the breadth of the coverage of the Wheeler-Howard Act that this language [Section 16 of the Act] would be effective only where there has been specific recognition by the United States of Indian rights to control absolutely tribal lands."

Turning to the instant case, it is therefore necessary for the United States and the Tribe, in order to make § 16 of the Indian Reorganization Act applicable, to show that "there has been specific recognition by the United States of Indian rights to control absolutely tribal lands." The Pyramid Lake Reservation was created by executive order on December 8, 1859. The creation of this reservation as such did not thereby convey any compensable interest in the lands to the Indians and rendered the reservation subject to termination at the will of either the Congress or the President. *Sioux Tribe v. United States*, 316 U.S. 317 (1942). This executive order certainly did not recognize any rights in the Indians to control absolutely the tribal lands in question. There has been no evidence presented in this case that any treaty exists between the Tribe and the United States, nor is there any evidence that the Tribe holds any of the lands or claimed water rights involved in this action by virtue of any patent or other conveyance from the United States. In short, there is no evidence in this case which would support a finding that the United States has ever specifically recognized in the Pyramid Lake Paiute Tribe the absolute right to control the lands in the Pyramid Lake Reservation.

The Tribe contends that the language quoted earlier from *Hynes* is merely dicta. However, this holding that there first must be specific recognition of Indian rights to control absolutely tribal lands before the provisions of § 16 of the Indian Reorganization Act are made applicable, is in conformity with prior case law and is entirely reasonable when dealing with executive order reservations. In *Sioux Tribe v. United States, supra*, the court held that

the interest received in Indian reservations created by executive orders "was subject to termination at will of either the executive or Congress. . . ." In *Hynes, supra,* the court stated that such rights "may be terminated by the unilateral action of the United States . . ." If the Tribe's contention is accepted and the Indians are given the power to prevent any sale or disposition of tribal lands by withholding their consent, then the power of the executive or Congress to unilaterally deal with such lands created by executive order is effectively checked. It is seriously doubted that Congress intended to divest itself and the executive of such power without such intention being expressly stated.[1]

There is still another reason why the Indian Reorganization Act is inapplicable to this case. As stated, the Act became law on June 18, 1934. By this time the executive or administrative decision not to assert a fishery right had already been made. The temporary restraining order was entered on February 13, 1926. Although aware of the growing problems with the fishery, no one applied for an amendment, alteration or modification of the Order to assert a fishery right. On June 18, 1934, the negotiations leading to the Truckee River Agreement were well under-

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[1]It should also be noted that in the debates on the Indian Reorganization Act that, when questioned, one of the authors of the bill, Senator Wheeler, expressed his view and intent that "[t]here is nothing touching water rights in any way, shape, or form in the pending bill, I will say to the Senator." 78 Cong. Rec. 11132; see also 78 Cong. Rec. 11137-11138. It should also be noted that the questioner was Senator Pittman from Nevada who specifically referred to the situation in Nevada at Walker Lake and Pyramid Lake.

way, during which the assertion of a fishery right was not made by the officials in charge. The decision not to assert a fishery right was made and followed before the Indian Reorganization Act became law. To hold that § 16 of the Indian Reorganization Act should apply retroactively would cast a cloud upon the titles to millions of acres of lands.

In accordance with Rule 52(a), Fed. R. Civ. Proc., the findings and conclusions contained in this decision shall constitute additional findings of fact and conclusions of law in this proceeding.

An appropriate judgment will be entered forthwith.

Dated this 8th day of December, 1977.

/s/ J. BLAINE ANDERSON
United States Circuit Judge
Sitting by Designation

Appendix F

In the United States District Court
For the District of Nevada

Civil No. R-1987-JBA

United States of America,
Plaintiff,
and
Pyramid Lake Paiute Tribe of Indians,
Plaintiff-Intervenor,

vs.

Truckee-Carson Irrigation District, et al.,
Defendants.

[Filed Dec. 12, 1977]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BRIEF SUMMARY OF PROCEDURAL BACKGROUND AND BASIC ISSUES

Following refusal by the United States Supreme Court to entertain original jurisdiction (*See United States v. Nevada and California*, 412 U.S. 534 (1973)), the United States as plaintiff instituted this action on its own behalf and on behalf of the Pyramid Lake Paiute Tribe of Indians (Tribe) on December 21, 1973. Among other things, the complaint sought to quiet title in the plaintiff in its fiduciary capacity of a *Winters* reserved water right (207 U.S.

564 (1908)) for the use and benefit of the Tribe, with a priority date of December 8, 1859, which would be superimposed over all other prior rights in the Truckee River, in order to fulfill the alleged purposes for which the reservation was created, including the maintenance and preservation of Pyramid Lake and the lower reaches of the Truckee River for fishery purposes.

As of October 8, 1974, the Tribe was permitted to intervene as a plaintiff in its own right, asserting the same fishery claim.

Many of the 17,000 plus defendants answered, setting up, among others, the defenses of res judicata and collateral estoppel based upon the prior adjudication in *United States of America v. Orr Water Ditch Company, et al.*, Equity No. A-3, in the United States District Court for the District of Nevada (*Orr Ditch*). Further, defendants assert that federal law does not recognize a *Winters* reserved water right for the executive order reservation for fishery purposes, but that if it does, that right has been irrevocably lost by application of res judicata and collateral estoppel principles.

Stated very succinctly, the plaintiff and Tribe seek to avoid the application of those preclusive principles on equitable and other grounds and for the further reason that during the prosecution of the *Orr Ditch* case there existed an impermissible conflict of interest among the government lawyers with respect to water rights being asserted for the plaintiff and those being asserted for the benefit of the Tribe, particularly a water right for fishery purposes, which conflict of interest denied the Tribe due process of law.

By order dated February 5, 1975, the affirmative defenses of res judicata and collateral estoppel were bifurcated for separate trial before the court and a discovery schedule was fixed.

The trial on the bifurcated issues commenced on November 17, 1975, and continued intermittently until conclusion of the evidentiary portion on May 20, 1976.

Following preparation of the reporter's transcript, special master exhibit indexes and post-trial briefing, final arguments were heard on October 27 and 28, 1977, and the matter was then submitted for decision on the bifurcated issues.

Accordingly, and based upon the evidence adduced, and the reasonable inferences to be drawn therefrom, the court does hereby make and enter findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. By order of the Commissioner of the General Land Office made on December 8, 1859, the lands comprising the Pyramid Lake Indian Reservation were withdrawn from the public domain for the use and benefit of the Indians (Tribe). This withdrawal was confirmed by President U. S. Grant by executive order of March 23, 1874, stating that the same "be withdrawn from sale or other disposition and set apart for the use of Pah-Ute and other Indians residing thereon." That said reservation is an executive order reservation as distinguished from a treaty reservation and no treaty exists between the Tribe and the plaintiff. There is no evidence that the Tribe holds any of the lands or

claimed water rights involved in this action by virtue of any patent or other conveyance from the United States. Title to the reservation lands and whatever appurtenances may exist with respect thereto is vested in the United States. The Tribe and its members, the present occupants of the reservation, are the lineal descendants of the Indian peoples who historically occupied the general area.

2. That said reservation situated in Western Nevada contains approximately 475,000 acres of land surrounding Pyramid Lake and extending up the Truckee River to a point several miles north of Wadsworth, Nevada. That Pyramid Lake is the terminus of the Truckee River and its tributaries and there is no outlet from the lake. It is approximately 20 miles long and 5 miles wide with an approximate maximum depth of 335 feet and is the remnant of prehistoric Lake Lahontan, which it is believed once covered much of Western Nevada. Its present surface elevation is approximately 3790 ft. The elevation has reduced since 1859. It has fluctuated considerably in the intervening years depending on many factors, but the elevation of the lake, based on recent records, gives the appearance of relative stabilization.

3. That the primary purpose for the creation of this Paiute reservation was in furtherance of the then existing national governmental policy of setting apart the various Indian tribes of the West on reservations on the public domain, conforming as nearly as possible to their historic areas of occupancy. That with respect to this Tribe there were several apparent subsidiary purposes for the creation of the reservation reflected in historic documents. It is not reasonably possible to rank these subsidiary purposes in

the order of greatest importance as among them. However, they are found to be (1) to remove the tribal members from the emigrant trails to avoid conflict with the white settlers and travelers; (2) to provide agricultural and grazing lands in order to further the policy of teaching the Indians the pursuits of agriculture and animal husbandry, and thereby diverting them from their nomadic habits and customs and their dependence upon hunting and fishing as their sole sources of sustenance, and (3) to provide the Indians with access to Pyramid Lake and at least the lower reaches of the Truckee River in order that they might obtain their sustenance, at least in part, from these historic fisheries.

4. That the Tribe was recognized by executive order as a separate and distinct tribe of Indians as early as 1859. Pursuant to the Act of June 18, 1934 (48 Stat. 984), as amended June 15, 1935 (49 Stat. 378), the Tribe adopted a constitution and bylaws and on November 21, 1936, was issued a corporate charter, and its corporate existence is still recognized and lawful; however, such recognition did not include the right to control absolutely tribal lands or interests appurtenant thereto.

5. That Lahontan cutthroat trout and cui-ui fish were native and indigenous to Pyramid Lake. That by 1940 the Lahontan cutthroat had become extinct, but that it was known for several decades prior thereto by many concerned persons that extinction was probable. A related species of cutthroat trout has been successfully introduced into the lake by the Indians in cooperation with interested state and federal agencies. The cui-ui, though felt to be

endangered, still exist in the lake and recent efforts toward restoration appear to justify optimism for eventual success.

6. That on June 17, 1902, the Irrigation and Reclamation Act of 1902 became law. On July 2, 1902, the Secretary of the Interior withdrew from public entry the lands required for the plaintiffs' first reclamation project, now known as the Newlands Project in the vicinity of Fallon, Nevada, and thereafter undertook and completed construction of the Derby Dam on the Truckee River, the Truckee Canal for diversion purposes, the Lahontan Dam and Reservoir on the Carson River, and the construction of approximately 250 miles of lateral and sub-lateral irrigation ditches sufficient to irrigate approximately 151,000 acres of dry and arid lands.

7. In order to further effect the national policy expressed in the Reclamation Acts, on March 13, 1913, the plaintiff commenced a quiet title action in the United States District Court for the District of Nevada, entitled *United States of America v. Orr Ditch Water Company, et al* (Orr Ditch), In Equity No. A-3. This action was specifically instituted by the plaintiff in order to quiet title in and to the waters of the Truckee River for the use and benefit of the plaintiff for the Newlands Reclamation Project and in its representative capacity for the use and benefit of the Pyramid Lake Paiute Tribe of Indians. On July 25, 1914, plaintiff filed an amended complaint adding new parties and to refer to the Truckee River "and its tributaries," and not just the Truckee River. Paragraph 16 of both the original and the amended complaint stated that the governmental purposes in instituting the action were, among

other things, to protect the "Indians and their descendants in their homes, fields, pastures, fishing, and their use of said land and waters."

8. That *Orr Ditch* was intended by all concerned, lawyers, litigants and judges, as a general all inclusive water adjudication suit which sought to adjudicate all rights and claims in and to the waters of the Truckee River and its tributaries, both natural and flood waters, to the end that its decree would determine the relative rights of the parties thereto so that "it may be known how much of said waters may be diverted from said river by the parties hereto and for what purposes, where, by what means of diversion, and with what priorities.", and required all parties to fully set up their respective water right claims.

9. That it was the intention of the plaintiff, by and through its attorneys, the Bureau of Indian Affairs, and the Bureau of Reclamation, to assert as large a water right as possible for the Indian reservation, and to do everything possible to protect the fish for the benefit of the Indians and the white population insofar as it was "consistent with the larger interests involved in the propositions having to do with the reclamation of thousands of acres of arid and now useless land for the benefit of the country as a whole." Prior to the institution of *Orr Ditch*, and during its pendency, a serious and reasonable doubt existed as to whether any *Winters* reserved water right could be claimed at all for an executive order Indian reservation among the attorneys, officers of the several Bureaus, and within the judiciary itself.

10. After extensive litigation and hearings, a temporary restraining order was entered in *Orr Ditch* on February 13, 1926. One of the primary purposes for entry of the temporary restraining order was to test the adjudications made therein and the operation of the Truckee River thoroughly before entry of a final and binding decree. The proceedings were left open for any person affected by the order to apply for amendment, alteration or modification. The Indians, the Bureau of Indian Affairs, the Bureau of Reclamation, the Nevada Fish and Game Commission, and others, were aware during all of this period of time of growing problems with the Pyramid Lake and Truckee River fishery, the spawning runs, the lowering of the lake and diminished river flows.

11. That the Tribe had the actual and legal ability and capacity of intervening in *Orr Ditch* from the time of its commencement up to and including entry of the final decree and clearly had such capacity and ability from and after November 21, 1936, for the purpose of asserting an alleged fishery water right.

That the Tribe successfully intervened in the *Orr Ditch* case on August 5, 1976.

12. On December 18, 1926, a contract was entered into by and between the United States and the Truckee-Carson Irrigation District (TCID), a defendant herein, whereby T.C.I.D. took over the operation and management of the Newlands Reclamation Project, including diversions from the Truckee River at Derby Dam and through the Truckee Canal to the Newlands Project.

13. The plaintiff in *Orr Ditch* and in this case, and most of the defendants in *Orr Ditch*, after extensive arms-length and good faith negotiations, entered into the Truckee River Agreement, dated July 1, 1935. Secretary of Interior Ickes had theretofore approved the same under date of January 15, 1935. On January 19, 1935, Assistant Commissioner of Indian Affairs, William Zimmerman, recommended approval of the Agreement by Secretary Ickes. A stipulation between the parties for entry of a final decree in *Orr Ditch* was likewise approved by the Secretary of the Interior and its interested Bureaus, including the Bureau of Indian Affairs.

14. That prior to and during the period from 1935 to 1944, the decline of the Pyramid Lake and Truckee River fishery was well known to the Indians, the Bureau of Indian Affairs, the Bureau of Reclamation, state and federal fish and game agencies and Nevada's congressional delegation, as well as others. Various suggestions or demands were made for an enforceable agreement to provide a flow into Pyramid Lake to provide some protection for the fishery. During this same period of time and up until entry of the final decree, some additional water rights were being asserted for an enlarged *Winters* irrigation right for the Indians (Tribe).

15. That executive level decisions were made within the Department of the Interior to proceed with entry of a final decree basically confirming and adopting the provisions of the Truckee River Agreement.

16. That on September 8, 1944, after several days of hearings and argument, wherein assertions were made for

additional or different water rights, the final decree in *Orr Ditch* was signed and entered.

17. Among other rights decreed, the Pyramid Reservation was awarded a *Winters* reserved water right with a priority date of December 8, 1859, of 14,742 acre feet of water per annum for the irrigation of 3130 acres of bottom lands (Claim No. 1) and to divert 5.59 acre feet per acre for delivery to the land of not to exceed 4.1 acre feet per acre per annum for the irrigation of 2745 acres of bench land (Claim No. 2) with a like priority date.

18. The *Orr Ditch* final decree specifically prohibits perpetually all parties from, among other things, claiming any of the water so decreed or interfering with the prior rights of any other persons or parties.

19. That no appeal was undertaken by any party or privy of a party from the *Orr Ditch* final decree and the same has become and is a final and binding determination and decree. In this present proceeding both the plaintiff and the Tribe recognize the rights and priorities decreed in the *Orr Ditch* final decree.

20. That at no time since the entry of the *Orr Ditch* final decree has any person, party or entity ever sought to reopen those proceedings.

21. That the Tribe and its members were at all times material herein and now are in privity with the plaintiff in the *Orr Ditch* proceedings.

22. That the defendants herein are the successors in interest of or were then and are now in privity with the defendants in the *Orr Ditch* proceedings.

23. That the cause of action sought to be asserted in this proceeding by the plaintiff and the Tribe is the same quiet title cause of action asserted by the plaintiff in *Orr Ditch* for and on behalf of the Tribe and its members, that is, a *Winters* implied and reserved water right for the benefit of the reservation, with a priority date of December 8, 1859, from a single source of water supply, i.e., the Truckee Watershed. The plaintiff and the Tribe may not litigate several different types of water use claims, all arising under the *Winters* doctrine and all derived from the same water source in a piecemeal fashion. There was but one cause of action in equity to quiet title in plaintiff and the Tribe based upon the *Winters* reserved right theory.

24. That the complaint and the amended complaint in *Orr Ditch* specifically alleged "fishing" as one of the rights to be adjudicated and as one of the purposes for the institution of those proceedings. That a full and fair opportunity was provided to the plaintiff and the Tribe to litigate that allegation and any supporting theory in those proceedings which extended from 1913 to 1944.

25. There is no evidence in this case that a *Winters* implied and reserved water right for fishery purposes was actually ever litigated in the course of the *Orr Ditch* proceedings.

26. That the plaintiff and the Tribe have continuously accepted and enjoyed the benefits of the water rights and priorities decreed in the *Orr Ditch* final decree and now accept said benefits and rely upon them.

27. That the defendants in *Orr Ditch* and their successors in interest in this case, as well as other persons, firms, corporations, entities, governmental units, agriculture, business, industry and labor have detrimentally relied upon the terms and conditions and the final and conclusive nature of the *Orr Ditch* final decree.

28. That by the enactment of the Reclamation Acts of 1902 and 1904, which declared a national policy of reclamation of the arid lands of the West, and the implementation thereof by the Department of the Interior by the construction and establishment of the Newlands Reclamation Project, there was a foreseeable conflict of purposes created by the Congress within the Interior Department and as between the Bureau of Reclamation on the one hand in asserting large water rights for its reclamation projects and the Bureau of Indian Affairs on the other in the performance of its obligations to protect the rights and interests of the Indians on the Pyramid Lake Paiute Indian Reservation. That this conflict of purposes was apparent prior to and during the *Orr Ditch* proceedings and was resolved within the executive department of government by top-level executive officers acting within the scope of their Congressionally-delegated duties and authority and were political and policy decisions of those officials charged with that responsibility, which decisions resulted in the extinguishment of the alleged fishery purposes water right.

29. The government lawyers in *Orr Ditch,* both departmental, agency and bureaus, as well as those charged with the responsibility for the actual conduct of the litigation, are not chargeable with an impermissible conflict of pur-

pose or interest in carrying out the decisions and directions of their superiors in the executive department of government and the Tribe has not suffered any deprivation or denial of due process of law by reason thereof which may be asserted or applied in this case to diminish or defeat the rights of the defendants acquired by the adjudication and the final decree in *Orr Ditch*. The good faith or motives of said government counsel is not questioned by plaintiff and the Tribe in this proceeding.

30. The Congressional, Executive and Judicial branches of the federal government have recognized, confirmed, dealt with and recompensed the Tribe for the taking or loss of the alleged fishery purposes water right in many actions taken both before and after the entry of the final decree in *Orr Ditch*. These include, but are not limited to, the following:

a. The Congressional, Executive and Judicial decisions in respect of and leading to the final decree in *Orr Ditch*.

b. The many Acts of Congress and the appropriations and expenditures by the federal government made pursuant thereto as reflected, for example, by Exhibit No. V-439, which does not include cooperation and expenditures by the State of Nevada, of sums exceeding $32,000,000.00 during the period 1973 to 1976 alone.

c. The additional sum of $8,000,000.00 awarded to the Tribe in Docket No. 87-B, on the 23rd day of July, 1975, by the Indian Claims Commission (36 Ind. Cl. Comm. 256) specifically as damages for the loss of the Tribe's alleged (but denied herein) *Winters* reserved water rights for the Pyramid Lake fishery and other

alleged water rights. That the findings, reservations and conclusions therein contained, based upon stipulation, are ineffective as against the defendants in these proceedings and are not binding on this court in this proceeding.

31. That if any impermissible conflict of interest existed (specifically found not to exist) with respect to the federal government lawyers in *Orr Ditch*, it was wholly internal to the government and was unknown to the defendants in *Orr Ditch* and they and their successors in interest herein are not chargeable with that knowledge and that conflict.

32. The plaintiff and the Tribe have failed to sustain their burden of proof by evidence of sufficient quality and credibility to prove that no harm or "hurt" will be sustained to the vested legal rights of priority water right holders under the *Orr Ditch* final decree if an 1859 right is superimposed over all other *Orr Ditch* decreed rights for certain minimum flow into the Truckee River for spawning and for flow into Pyramid Lake.

33. This court finds both generally and specifically against any and all other claims or theories of the plaintiff and of the Tribe of an equitable or other nature by which they seek to avoid the application of res judicata to claims asserted in these proceedings. The plaintiff and the Tribe have failed to sustain their burden of proof on those issues.

34. That the findings of fact contained in the Memorandum Decision filed simultaneously herewith are incorporated herein by reference.

CONCLUSIONS OF LAW

1. That this court has jurisdiction of the parties and the subject matter pursuant to 28 U.S.C. § 1345.

2. That any conclusions of law that may appear in the foregoing 34 findings of fact are hereby incorporated herein by reference.

3. That the court in *Orr Ditch* entered its final decree on the merits, was a court of competent jurisdiction, and had, and still has, jurisdiction over the parties thereto, their privies and successors in interest and of the subject matter of those proceedings.

4. That the principles and all of the elements of the doctrine of res judicata have been established by the defendants by clear and convincing evidence and by reason thereof and of the adjudications made or which could have been made in the *Orr Ditch* final decree, the plaintiff and the Tribe are barred from asserting and litigating those same claims in these proceedings.

5. That the principles and elements of the doctrine of collateral estoppel do not apply to bar the claims of the plaintiff and the Tribe and the defendants have failed to sustain their burden of proof on that defense.

6. The lawyers who represented the plaintiff in *Orr Ditch* had no prohibited conflict of interest and said lawyers at all times acted properly and ethically in representing the plaintiff in that proceeding. The Tribe suffered no denial of due process actionable in this proceeding.

7. The plaintiff and the Tribe have failed to prove any of the claims and theories alleged and asserted by them

to avoid application of the defense of res judicata and the court concludes both generally and specifically against the plaintiff and the Tribe on those issues and concludes in favor of the defendants with respect to each of them.

8. That all conclusions of law appearing in the Memorandum Decision filed simultaneously herewith are incorporated herein by reference.

9. No costs are allowed.

Dated at Boise, Idaho, this 8th day of December, 1977.

/s/ J. BLAINE ANDERSON
United States Circuit Judge
Sitting by Designation

Appendix G

TRUCKEE RIVER AGREEMENT

Approved as to form by
HAROLD L. ICKES
Secretary of the Interior
United States of America

June 13, 1935

THIS AGREEMENT made this 1st day of July, 1935, by and between:

UNITED STATES OF AMERICA (hereinafter called the "United States"), party of the first part,

TRUCKEE-CARSON IRRIGATION DISTRICT, an irrigation district organized and existing under the laws of the State of Nevada (hereinafter called the "Irrigation District"), party of the second part,

WASHOE COUNTY WATER CONSERVATION DISTRICT, an irrigation district organized and existing under the laws of the State of Nevada (hereinafter called the "Conservation District"), party of the third part,

SIERRA PACIFIC POWER COMPANY, formerly The Truckee River General Electric Company, a corporation incorporated under the laws of the State of Maine (hereinafter called the "Power Company"), party of the fourth part,

SUCH OTHER USERS OF THE WATERS OF THE TRUCKEE RIVER and or its tributaries within the Conservation District as shall become parties to this agreement by signing their names hereto, parties of the fifth part,

WHEREAS, the parties hereto (other than the Conservation District) are users and/or diverters of water flowing from Lake Tahoe and/or in the Truckee River and its tributaries in the State of Nevada, and all of the parties hereto desire to conserve the waters of said lake and River and its tributaries, and to raise and stabilize the mean

elevation of the water surface of said Lake, in order that said parties and the owners of lands bordering on or in the vicinity of said Lake may obtain the benefits arising therefrom; and

WHEREAS, it is necessary for the accomplishment of the foregoing objects that additional facilities for the storage of flood waters of the Truckee River and its tributaries be constructed and or acquired; that rates of flow of winter draft from Lake Tahoe be reduced; and that the parties hereto cooperate with each other as provided herein; and

WHEREAS, the United States, for the purpose of providing for the irrigation of lands within the Newlands Reclamation Project in the State of Nevada and carrying out the provisions of the Act of Congress of the United States approved June 17, 1902, entitled: "An Act appropriating the receipts from the sale and disposal of public lands in certain states and territories to the construction of irrigation works for the reclamation of arid land", (32 United States Statutes at Large, p. 383; United States Code, Title 43, Sec. 411 et seq.) and acts amendatory thereof and supplemental thereto, heretofore acquired an easement and right of exclusive possession and enjoyment in, over and upon certain lands (including the dam and controlling works) at the outlet of Lake Tahoe under and pursuant to a judgment and decree entered by the District Court of the United States, in and for the Northern District of California, Second Division, on June 4, 1915, and a final order of condemnation entered June 28, 1915, in the cause therein numbered 14861, brought by the United States as plaintiff against said The Truckee River General

Electric Company as defendant, by which judgment and decree the manner of operation of said dam and controlling works by the officers and agents of the United States for the purpose of securing the rights of the United States and said The Truckee River General Electric Company in and to the use of the waters therein mentioned was prescribed; and

WHEREAS, the Irrigation District consists of approximately 87,500 acres of irrigable land situate in the Counties of Lyon, Churchill, Washoe and Storey in the State of Nevada, comprising the Truckee and Carson Divisions of the Newlands Reclamation Project, all of which land is wholly or partially dependent for irrigation upon water diverted from the Truckee River and its tributaries into the Truckee Canal and/or Lahontan Reservoir in said Project, and after the entry of said judgment and decree the United States entered into an agreement with the Irrigation District, dated December 18, 1926, whereby the United States transferred to the Irrigation District, and the Irrigation District assumed, the care, operation and maintenance of said dam and controlling works and other properties and also the care, operation and maintenance of said Newlands Reclamation Project, system of works and custodial possession thereof; and

WHEREAS, the United States heretofore filed a suit in the District Court of the United States in and for the District of Nevada, wherein the United States is plaintiff and Orr Water Ditch Company and other users of the waters of the Truckee River are defendants (which suit is referred to herein as the "Truckee River Adjudication Suit" and is numbered in the records of said Court In

Equity A-3 and is now pending therein), for the purpose of obtaining an adjudication of the rights of the users in the State of Nevada to the waters of the Truckee River and its tributaries in the State of Nevada, in which suit said Court, on the 13th day of February, 1926, after a full hearing of the parties to said suit, made and caused to be entered a Temporary Restraining Order, in which is set forth the relative rights and priorities of the parties to said suit in and to the waters of Lake Tahoe and of the Truckee River and its tributaries as found by said Court; and

WHEREAS, the Conservation District was organized for the purpose (among others) of capturing, storing and conserving waters of the Truckee River and its tributaries to supplement the supply of irrigation water for the benefit of lands within its boundaries (including the lands commonly known as the Truckee Meadows situate within said Counties of Washoe and Storey), and for the further purpose of expediting the entry of a final decree in said Truckee River Adjudication Suit, and in furtherance of said first mentioned purpose has heretofore acquired certain valuable application rights to store unappropriated water of the Truckee River and its tributaries; and

WHEREAS, the Power Company is the owner of certain rights in and to waters of Lake Tahoe and the Truckee River and its tributaries and owns and operates certain hydro-electric power plants situate on said River and supplies electrical energy therefrom to the public in the States of California and Nevada and to the inhabitants of the Cities of Reno and Sparks and vicinity, and also supplies

water to said inhabitants for municipal and domestic uses and for irrigation and stock purposes; and

WHEREAS, the parties of the fifth part herein or their predecessors in interest, are defendants in said Truckee River Adjudication Suit and are owners of rights in and to waters of the Truckee River and its tributaries for the irrigation of lands situate within the boundaries of the Conservation District in the State of Nevada and other beneficial uses, and will be benefited by the conservation of water resulting from the acquisition or construction of the works herein provided to be acquired and/or constructed, and by the carrying out of the provisions of this agreement; and

WHEREAS the carrying out of the provisions of this agreement will assist in conserving the waters of said Lake and River and its tributaries and will obviate expensive and continued litigation and aid in effecting necessary flood control of the waters of said river and its tributaries:—

NOW, THEREFORE, THIS AGREEMENT WITNESSETH:

ARTICLE I. Definitions.

The following terms used in this agreement, when capitalized, shall have, for the purposes of this agreement, the meanings hereinbelow set forth in this article:

(A) DIVERTED FLOW means the total amount at any specified time of all water diverted from the Truckee River (determined by simultaneous measurements in cubic feet per second), at points between ICELAND GAGE and

Derby Dam (including water diverted by the Truckee Canal and the water by-passed at Derby Dam in excess of irrigation requirements below Derby Dam as provided in the TRUCKEE RIVER FINAL DECREE), consisting of (1) NATURAL FLOW, (2) water released from Lake Tahoe, (3) water released from SUPPLEMENTAL RESERVOIR, and (4) PRIVATELY OWNED STORED WATER referred to in subparagraph (4) of Paragraph (A) of Article III of this agreement; provided that DIVERTED FLOW shall not include: (1) released PRIVATELY OWNED STORED WATER (other than PRIVATELY OWNED STORED WATER referred to in subparagraph (4) of Paragraph (A) of Article III hereof), (2) NATURAL FLOW in excess of FLORISTON RATES at ICELAND GAGE, (3) water diverted for the generation of electrical energy and other power, and/or for the removal of ice as provided in Paragraph (E) of Article III and Paragraph (B) of Article V hereof, which is returned to the Truckee River.

The amount of DIVERTED FLOW at any specified time shall be determined by adding: (1) the amounts of all waters diverted at such time from the Truckee River by conduits having their places of diversion in said River between ICELAND GAGE and Derby Dam (including Truckee Canal) and (2) the amount of water (if any) by-passed at Derby Dam in excess of irrigation requirements below said Derby Dam as provided in the TRUCKEE RIVER FINAL DECREE, and subtracting from the result of such addition the aggregate of: (1) the amount of water diverted at such time for the generation of electrical energy or other power, and/or for the removal of ice as mentioned in Paragraph (E) of Article III and Paragraph

(B) of Article V of this agreement, and which is returned to said River, (2) the NATURAL FLOW at ICELAND GAGE in excess of FLORISTON RATES, (3) the amount of PRIVATELY OWNED STORED WATER (other than PRIVATELY OWNED STORED WATER referred to in subparagraph (4) of Paragraph (A) of Article III hereof) diverted at such time by said conduits. The result shall be the amount of DIVERTED FLOW at such time. For the purposes of the foregoing computations all measurements of water shall be made in cubic feet per second.

(B) FLORISTON RATES means the rate of flow in the Truckee River at the head of the diversion penstock at Floriston, California (but measured at the ICELAND GAGE) consisting of an average flow of 500 cubic feet of water per second each day during the period commencing March 1 and ending September 30 of any YEAR, and an average flow of 400 cubic feet of water per second each day during the period commencing October 1 and ending the last day of the next following February of any year.

(C) ICELAND GAGE means a measuring device located in the Truckee River between the point of diversion of the penstock at Floriston, California, mentioned in the 1915 DECREE, and the point of confluence of Gray's Creek and the Truckee River, which gage is used to determine the rate of flow of water in the Truckee River at said point.

(D) MUNICIPAL AND DOMESTIC USES of water means the use of water, delivered through the mains of the distribution system of the Power Company, for municipal, domestic, sanitary, fire protection, lawn and residential

garden irrigation, industrial and/or all other similar uses, exclusive, however, of use for the irrigation of farm areas.

(E) NATURAL FLOW means all water (including water now contributing to Lake Tahoe) flowing in the Truckee River and its tributaries, exclusive of:

(1) water artificially impounded in Lake Tahoe, SUPPLEMENTAL RESERVOIR, or elsewhere, and released into said River, or its tributaries, and water diverted from any water shed (other than the Truckee River water shed) and released into said River, or its tributaries; and

(2) that portion of the flow in Hunter Creek actually diverted by the Power Company in accordance with and for the uses provided in, the TRUCKEE RIVER FINAL DECREE.

Water diverted from the Truckee River and/or its tributaries for irrigation, domestic, municipal and/or livestock watering purposes which, after use, is returned through seepage or otherwise to said River shall, after its return to said River, be deemed part of the NATURAL FLOW thereof; provided, however, that the classification of water diverted for the generation of electrical energy or other power purposes shall not, after the return of such water to said River, be changed by reason of such diversion.

(F) 1915 DECREE means the judgment and decree entered in the District Court of the United States, in and for the Northern District of California, Second Division, on June 4, 1915, in the cause therein entitled "United States

of America, plaintiff, v. The Truckee River General Electric Company (a corporation), defendant", numbered 14861, a copy of which judgment and decree is attached hereto, marked "Exhibit C" and by reference made a part hereof.

(G) OPERATIVE DATE OF THIS AGREEMENT is the date when all of the Articles of this agreement are effective, as provided in Paragraph (A) of Article XX.

(H) "Person" and "Persons" include individuals, partnerships, associations and/or corporations, both public and private.

(I) PONDAGE means facilities consisting of a reservoir or reservoirs created by a dam or dams and controlling works and other necessary equipment, constructed and installed for the purpose of regulating the flow of the Truckee River at ICELAND GAGE and of storing water of said River and/or its tributaries.

(J) PRIVATELY OWNED STORED WATER means water (not including water impounded in SUPPLEMENTAL RESERVOIR after its release into the Truckee River or its tributaries, or water stored in and/or now contributing to the water of Lake Tahoe, after its release into said River) impounded by any person under such conditions that the right to the use of such water shall be vested in such person, his successors or assigns.

(K) REDUCED FLORISTON RATES means rates of flow of water in the Truckee River, measured at the ICELAND GAGE, effective and in force during the period commencing November 1 and ending the next following March 31 of each YEAR, determined as follows, viz.:

(1) 350 cubic feet per second whenever the elevation of the water surface of Lake Tahoe is below 6226.0 feet above sea level and not below 6225.25 feet above sea level, and

(2) 300 cubic feet per second whenever the water surface elevation of Lake Tahoe is below 6225.25 feet above sea level.

(L) SUPPLEMENTAL RESERVOIR means facilities on the Little Truckee River consisting of a storage reservoir having a capacity of not less than 40,000 acre feet, for the storage and control of water and the release thereof into the Little Truckee River.

(M) (1) SUPPLEMENTAL STORAGE WATER means the first 25,000 acre feet of water (or, if, a lesser quantity be diverted and stored, then such lesser quantity) diverted and stored in SUPPLEMENTAL RESERVOIR during any year commencing October 1 and ending September 30 next following under the provisions of Paragraph (A) of Article IV of this agreement.

(M) (2) ADDITIONAL SUPPLEMENTAL STORAGE WATER means all water diverted and stored in SUPPLEMENTAL RESERVOIR in excess of SUPPLEMENTAL STORAGE WATER.

(N) TRUCKEE CANAL WATER means that part of the flow of the Truckee River, to the extent of 1500, cubic feet per second, decreed to the United States by the TRUCKEE RIVER FINAL DECREE for diversion into the Truckee Canal.

(O) TRUCKEE RIVER FINAL DECREE means the final decree which by Article X hereof the parties agree

may be entered in said cause pending in the District Court of the United States in and for the District of Nevada, entitled "The United States of America, plaintiff, V. Orr Water Ditch Company, et al, defendants, in Equity No. A-3."

(P) YEAR means a period of twelve consecutive months beginning with the date first mentioned in each instance. The word "year" when not capitalized shall refer to the calendar year.

ARTICLE II. Construction, operation and ownership of PONDAGE and SUPPLEMENTAL RESERVOIR.

(A) Construction of PONDAGE.

The Power Company (subject to the terms of this agreement) agrees, at its own expense, after securing all necessary permits required by law, to acquire and/or construct in the channel of the Truckee River or Little Truckee River at a location to be selected by it between ICELAND GAGE and a point near Boca, California, PONDAGE having a storage capacity (computed without freeboard) of not less than 200 acre feet (if PONDAGE be in the channel of the Truckee River), or of not less than 800 acre feet (if PONDAGE be in the channel of the Little Truckee River), with outlet control works having a discharge capacity of not less than 500 cubic feet per second, for the purpose of storing and conserving water in Lake Tahoe, or other reservoirs and water flowing in the Truckee River, by regulating the flow of said River when the flow thereof does not exceed FLORISTON RATES, so as to create a rate of flow at ICELAND GAGE which shall be uniform as nearly as practicable.

The Power Company shall, at its own expense, make and prosecute all applications for permits required by law for the acquisition and/or construction of PONDAGE. The Power Company further agrees (subject to the terms of this agreement), to complete the construction of PONDAGE on or before March 1, 1936.

(B) Construction of SUPPLEMENTAL RESERVOIR.

The Conservation District agrees (subject to the terms of this agreement) that it will by or through an agreement or agreements with the United States, or otherwise, without expense to the Irrigation District or the Power Company, and after securing all permits required by law, cause to be constructed, on or before March 1, 1936, SUPPLEMENTAL RESERVOIR on the Little Truckee River near Boca, California, having a storage capacity of not less than 40,000 acre feet, with outlet control works having a discharge capacity of not less than 500 cubic feet per second under a static head of 30 feet, provided, however, that the Conservation District shall not be required, in order to construct SUPPLEMENTAL RESERVOIR, to obligate itself to the United States in an amount exceeding One Million Dollars, and if a reservoir with a capacity of 40,000 acre feet or more cannot be constructed for said sum or less, then in that event this agreement shall be null and void, unless otherwise agreed by the Truckee-Carson Irrigation District and the Washoe County Water Conservation District.

The making of an award by the United States of contract for such construction shall be conclusive evidence that SUPPLEMENTAL RESERVOIR can be constructed for

such sum within the meaning of this paragraph (B). The Conservation District, shall, at its own expense make and prosecute, or cause to be made and prosecuted, all applications for permits required by law for the acquisition and/or construction of SUPPLEMENTAL RESERVOIR.

Nothing in this Paragraph (B) contained, however, shall operate to exempt any party hereto from the payment of any taxes or assessments lawfully levied or to be levied upon any property of such party, and such taxes and assessments shall not be deemed an expense within the meaning of this paragraph (B).

(C) Operation, Ownership and Maintenance of PONDAGE and SUPPLEMENTAL RESERVOIR.

(1) Operation of PONDAGE and SUPPLEMENTAL RESERVOIR.

From and after the OPERATIVE DATE OF THIS AGREEMENT PONDAGE shall be operated by the Power Company at its own expense for the accomplishment, in so far as practicable, of the purposes for which the same is to be constructed as stated in paragraph (A) of this Article II, subject to the limitations and conditions prescribed in this agreement. At all times during the period commencing April 1 and ending October 31 next following of any YEAR when the flow of the Truckee River at ICELAND GAGE shall not exceed FLORISTON RATES, PONDAGE shall be so operated as to maintain, in so far as practicable, uniform rate of flow in said River at ICELAND GAGE. During the period commencing November 1 and ending March 31 next following of any YEAR the Power Company may so operate PONDAGE

as to fluctuate the flow of the Truckee River at ICELAND GAGE, and/or at any other point selected by it, to such extent as it may deem desirable in connection with the operation of its hydro-electric plants.

From and after the OPERATIVE DATE OF THIS AGREEMENT SUPPLEMENTAL RESERVOIR shall be operated by the Conservation District at its own expense, subject to the limitations and conditions prescribed in this agreement.

The Power Company shall, at its own expense, make all repairs necessary in order to maintain PONDAGE in an efficient operating condition, and, similarly, the Conservation District shall, at its own expense, make all repairs necessary in order to maintain SUPPLEMENTAL RESERVOIR in an efficient operating condition.

PONDAGE and SUPPLEMENTAL RESERVOIR shall be subject to the terms of this agreement, not only while owned by the Power Company and the Conservation District (as the case may be), but also while owned by their respective nominees and/or successors in interest.

(2) Ownership of PONDAGE and SUPPLEMENTAL RESERVOIR.

The ownership of PONDAGE shall be vested in the Power Company or other person, firm or corporation nominated or designated by it for that purpose, and no person, firm and/or corporation, other than the Power Company (and/or the person, firm or corporation so nominated or designated by it) shall acquire any ownership therein or claim of title thereto by reason of the execution of this agreement.

The ownership of said SUPPLEMENTAL RESERVOIR shall (unless vested in the United States by reason of the construction of said reservoir by the United States) be vested in the Conservation District or other person, firm or corporation named or designated by it for the purpose, and, unless said ownership is so vested in the United States, no person, firm and/or corporation other than the Conservation District (and/or the person, firm or corporation so named or designated by it) shall acquire any ownership therein or claim to title thereto by reason of the execution of this agreement.

If PONDAGE and/or SUPPLEMENTAL RESERVOIR shall be acquired and/or owned by any nominee of the Power Company or the Conservation District (as the case may be) the Power Company or the Conservation District (as the case may be) will promptly cause such nominee (if not already a party hereto and bound hereby) to enter into an agreement with the other parties hereto that PONDAGE or SUPPLEMENTAL RESERVOIR (as the case may be) shall be operated under and subject to the terms of this agreement. If such nominee shall fail to promptly enter into such agreement with the other parties hereto, such nomination shall be ineffective for any purpose.

(D) Construction of Regulating Reservoirs.

(1) The Power Company agrees that in the event PONDAGE is acquired or constructed in the channel of the Little Truckee River, in accordance with Paragraph (a) of Article II, it will, at its own expense, after securing all necessary permits required by law, acquire and/or con-

struct in the channel of the Truckee River at a location to be selected by it between Floriston, California, and the intake of the Washoe Power Ditch in Nevada, a regulating reservoir having a capacity sufficient to regulate the flow of the Truckee River during the period commencing April 1st and ending October 31st of any YEAR, when the flow of said River does not exceed FLORISTON RATES. The Power Company further agrees to complete the construction of such regulating reservoir on or before March 1, 1936.

(2) From and after the OPERATIVE DATE OF THIS AGREEMENT, the Power Company agrees to operate such regulating reservoir at its own expense during the period, commencing April 1st and ending October 31st of any YEAR, so that the daily fluctuations of the flow of said Truckee River at such point will not exceed six (6) per cent of said flow.

(3) The Power Company (subject to the terms of this agreement) shall be entitled also, at its option, to construct other regulating reservoirs at points in the channel of the Truckee River below Floriston, California, in addition to the regulating reservoir in subparagraph (1) of this Paragraph (D) referred to, and to operate all regulating reservoirs referred to in this Paragraph (D) during the period commencing November 1st and ending March 31st of any YEAR for the purpose of fluctuating the flow of the Truckee River in connection with the operation of its power plants.

ARTICLE III. Rates of flow in Truckee River.

(A) Maintenance of FLORISTON RATES and REDUCED FLORISTON RATES.

(1) Except as otherwise provided in this agreement, all water in Lake Tahoe which is capable of being released into the Truckee River by the operation of the gates at the outlet thereof shall from and after the OPERATIVE DATE OF THIS AGREEMENT be released into said River as and to the extent required to maintain FLORISTON RATES or REDUCED FLORISTON RATES (whichever shall be in force) in accordance with the provisions of this agreement.

(2) Releases of water from Lake Tahoe and/or of water impounded in SUPPLEMENTAL RESERVOIR shall not (unless otherwise mutually agreed by the Conservation District, the Power Company and the Irrigation District) be made at any time at a rate which will cause a flow at ICELAND GAGE in excess of FLORISTON RATES or REDUCED FLORISTON RATES (whichever may then be in force), except as otherwise provided in this agreement.

(3) During the period commencing April 1 and ending October 31 next following of any YEAR FLORISTON RATES shall, at all times when possible, be maintained unless a temporary reduction thereof for part of the current irrigation season shall be mutually agreed to by the Power Company, the Conservation District and the Irrigation District. In the event that such temporary reduction in FLORISTON RATES shall be mutually agreed to by the Power Company, the Conservation District and the Irrigation District, the Power Company shall request the

United States, and the Irrigation District, pursuant to the provisions of paragraphs (a) and (b) of Article Fifth of the 1915 DECREE, to reduce such flow in accordance with such agreement.

(4) Whenever FLORISTON RATES or REDUCED FLORISTON RATES, as the case may be, are being maintained in whole or in part by water from Lake Tahoe and the Conservation District, the Power Company and/or the Irrigation District shall release into the Truckee River or its tributaries PRIVATELY OWNED STORED WATER for the purpose of maintaining, in whole or in part, FLORISTON RATES or REDUCED FLORISTON RATES (whichever shall be in force), and the Power Company shall, upon request of the party making such release, request the United States and the Irrigation District, in accordance with the provisions of paragraphs (a) and (b) of Article Fifth of the 1915 DECREE, to limit the draft from Lake Tahoe by an amount of water equivalent to the amount of such PRIVATELY OWNED STORED WATER so released, and the Irrigation District shall, after receiving such request from the Power Company, so operate the dam and controlling works at the outlet of said Lake as to reduce the draft from said Lake during the period of such release of PRIVATELY OWNED STORED WATER by an amount equivalent, so far as reasonably practicable, to the amount of such PRIVATELY OWNED STORED WATER so released, or, if it be impossible to reduce the draft from said Lake to the full amount of such PRIVATELY OWNED STORED WATER so released, then by the largest reduction of draft which it is possible to make: provided, however, that such PRIVATELY

OWNED STORED WATER so released shall, to the extent of the amount of water by which the draft from Lake Tahoe was so reduced become DIVERTED FLOW.

(5) During the period commencing November 1 and ending March 31 next following of each YEAR (after the OPERATIVE DATE OF THIS AGREEMENT) whenever the water surface elevation of Lake Tahoe shall be higher than 6226.0 feet above sea level, FLORISTON RATES shall be in force and shall be maintained.

(B) Rates of flow at ICELAND GAGE when level of Lake Tahoe is below 6226.0 feet above sea level.

(1) During the period commencing November 1 and ending the next following March 31 of each YEAR after the OPERATIVE DATE OF THIS AGREEMENT, whenever the water surface elevation of Lake Tahoe shall be lower than 6226.0 feet above sea level REDUCED FLORISTON RATES shall be in force and shall be maintained to the extent possible, subject to the applicable provisions of this agreement.

(2) During the period commencing November 1 and ending March 31 next following of any YEAR after the OPERATIVE DATE OF THIS AGREEMENT when REDUCED FLORISTON RATES are in effect, rates of flow in excess of or less than REDUCED FLORISTON RATES (but not to exceed FLORISTON RATES) may be maintained upon request of the Power Company to the United States and the Irrigation District and/or the Conservation District, who shall, in so far as practicable, make such releases of water from Lake Tahoe and/or of SUPPLE-

MENTAL STORAGE WATER impounded during the twelve months ending September 30 next preceding such period, and/or ADDITIONAL SUPPLEMENTAL STORAGE WATER released in accordance with the provisions of Paragraph (C) of this Article III, as are required to maintain such requested rates of flow; provided,

(a) That the total of such releases to maintain such requested rates of flow during such periods shall not on any specified date exceed by more than 6,000 acre feet the amount of water which would have been released from such sources between such specified date and the OPERATIVE DATE OF THIS AGREEMENT if the effective rates of flow in said river had been maintained to the extent possible as provided in this agreement;

(b) That the total of such releases to maintain such requested rates of flow during such periods shall not on any specified date be less, by more than 6,000 acre feet, than the amount of water which would have been released from such sources between such specified date and the OPERATIVE DATE OF THIS AGREEMENT if the effective rates of flow in said River had been maintained to the extent possible as provided in this agreement;

(c) PRIVATELY OWNED STORED WATER may be released by the owner thereof in lieu of releases of water from Lake Tahoe and/or SUPPLEMENTAL RESERVOIR subject to the provisions of subparagraph (4) of Paragraph (A) of this Article III;

(d) All water released from SUPPLEMENTAL RESERVOIR UNDER the provisions of this paragraph (B) shall be subject to the provisions of subparagraph (5) of Paragraph (C) of this Article; and

(e) That the amounts of water released under the provisions of subparagraph (4) of this Paragraph (B) and of Paragraph (E) of this Article III shall not be included in the determination of the amounts of water released, as provided in this Paragraph (B).

(3) All reductions in FLORISTON RATES shall be effected pursuant to paragraphs (a) and (b) of Article Fifth of the 1915 DECREE and/or by request of the Power Company to the Conservation District for releases of water from SUPPLEMENTAL RESERVOIR, in the manner following, to wit:

(a) For the purpose of effecting the reductions in FLORISTON RATES as provided in subparagraphs (1) and (2) of this paragraph (B), the Power Company shall give notice to the United States and the Irrigation District as provided in paragraphs (a) and (b) of said Article Fifth of the 1915 DECREE to so operate the dam and controlling works at the outlet of Lake Tahoe as to effect the reduction in flow below FLORISTON RATES required in order to carry out the provisions of this agreement; provided, however, that if the Power Company shall fail after the OPERATIVE DATE OF THIS AGREEMENT to give any notice required by the terms of this agreement, then this agreement shall be deemed for all purposes a notice by the Power Company to the United States and the Irrigation District in accordance with the pro-

visions of said paragraphs (a) and (b) of Article Fifth of the 1915 DECREE to so operate said dam and controlling works as to fulfill the provisions of this agreement: For the purpose of effecting the rates of flow of the Truckee River at ICELAND GAGE as provided in subparagraphs (1) and (2) of this Paragraph (B), the Power Company shall request the Conservation District to release water from SUPPLEMENTAL RESERVOIR (subject to subparagraph (5) of Paragraph (C) of this Article III) at such rates of discharge as the Power Company may desire, limited, however, to an amount necessary to maintain FLORISTON RATES; provided, however, that if the Power Company shall fail, in the opinion of the Conservation District, to give such notice in time to allow the Conservation District to comply with the requirements of subparagraph (4) of Paragraph (C) of this Article III, then the right of the Power Company to make such request shall terminate for such YEAR, and the Conservation District shall, subject to subparagraph (5) of Paragraph (C) of this Article III, release any SUPPLEMENTAL STORAGE WATER remaining in SUPPLEMENTAL RESERVOIR in accordance with subparagraph (4) of Paragraph (C) of this Article III.

(4) During the period commencing November 1 and ending March 31 next following of any YEAR, when REDUCED FLORISTON RATES are in effect, water from Lake Tahoe and/or SUPPLEMENTAL STORAGE WATER impounded during the twelve months ending September 30 next preceding such period, shall be released

by the Irrigation District or the Conservation District (as the case may be) upon request of the Power Company in an amount up to (but not exceeding) 1500 acre feet, for the purpose of maintaining such rates of flow in excess of REDUCED FLORISTON RATES (but not in excess of FLORISTON RATES), as may be requested by the Power Company, provided the following conditions exist simultaneously:

(a) The electrical energy from the hydro-electric and other power plants of the Power Company combined with the electrical energy from other sources which it is then entitled to receive and is available is by reason of partial or complete breakdown inadequate to meet the full load demand of the Power Company; and

(b) The Power Company is releasing at maximum possible rates of flow water (if any) stored for power purposes which it can and under the terms of this agreement may release for such purposes.

(C) Release of water from Lake Tahoe and of SUPPLEMENTAL STORAGE WATER for purpose of maintaining FLORISTON RATES and REDUCED FLORISTON RATES.

Unless the Conservation District, the Power Company and the Irrigation District agree otherwise, SUPPLEMENTAL STORAGE WATER and water from Lake Tahoe shall be released into the Truckee River to the extent possible or necessary, as follows, viz.:

(1) The Conservation District shall, during the period commencing April 1 and ending October 31 next following

of any YEAR, upon request of the Power Company, release SUPPLEMENTAL STORAGE WATER in an amount up to but not exceeding 4000 acre feet during any such period, at such times and at such rates of FLOW as may be required for the purpose of regulating the flow of the Truckee River by the operation of PONDAGE as provided in Paragraph (C) of Article II of this agreement; provided, however, that if FLORISTON RATES cannot be maintained at any time during such period with other water available for that purpose, then and in such event the said 4000 acre feet or any part thereof shall be used to maintain FLORISTON RATES to the extent possible or necessary.

(2) If the water surface elevation of Lake Tahoe at any time during the period commencing April 1 and ending October 31 next following of any YEAR shall be higher than 6225.5 feet above sea level, then and in that event (subject to the provisions of subparagraph (1) of this Paragraph (e), so long during said period as said elevation shall be higher than 6225.5 feet above sea level, drafts from Lake Tahoe shall be reduced to the maximum extent legally permissable and SUPPLEMENTAL STORAGE WATER shall be released, to the extent possible, in order to maintain FLORISTON RATES; provided that if such releases shall be insufficient to fully maintain FLORISTON RATES, the Irrigation District shall release water from Lake Tahoe to the extent required, so far as reasonably practicable, to make up such deficit in FLORISTON RATES; and provided further that 4000 acre feet of SUPPLEMENTAL STORAGE WATER, subject to release under the provisions of this subparagraph (2), shall be

retained in SUPPLEMENTAL RESERVOIR for the purpose provided for in subparagraph (1) of this Paragraph (C).

(3) If the water surface elevation of Lake Tahoe at any time during the period commencing April 1 and ending October 31 next following of any YEAR be 6225.5 feet above sea level, or lower, then and in that event (subject to the provisions of subparagraph (1) of this Paragraph (C), so long during said period as said elevation shall be 6225.5 feet above sea level or lower, water from Lake Tahoe shall be released, to the extent possible, to maintain FLORISTON RATES; provided that if such releases shall be insufficient to fully maintain FLORISTON RATES, the Conservation District shall release SUPPLEMENTAL STORAGE WATER to the amount required and ADDITIONAL SUPPLEMENTAL STORAGE WATER, subject to the provisions of Paragraph (C) of this Article III, to make up such deficit in FLORISTON RATES, or, if it be impossible to fully make up such deficit by such releases, then the Conservation District shall release into the Truckee River the largest amount of such water from SUPPLEMENTAL RESERVOIR which can be released.

(4) During the period commencing October 31 and ending March 1 next following of any YEAR all SUPPLEMENTAL STORAGE WATER impounded prior to the next preceding October 1, which shall remain in SUPPLEMENTAL RESERVOIR on October 31 of such YEAR shall be released by the Conservation District into the Truckee River for the purpose of maintaining FLORISTON RATES or REDUCED FLORISTON RATES (whichever shall be in force at the time), subject, however,

to the provisions of Paragraph (B), subparagraph (5) of Paragraph (C) and Paragraph (E) of this Article III.

(5) SUPPLEMENTAL STORAGE WATER impounded during the period commencing October 1 and ending April 1 next following of any YEAR shall not be released during said period of such YEAR, except at the option of the Conservation District.

(D) Release of 4,000 acre feet of TRUCKEE CANAL WATER for power use.

The Power Company may at any time or times it deems it necessary or advisable so to do, release into the Truckee River during the period commencing October 1 and ending the last day of February next following of any YEAR all or any of the 4,000 acre feet of water referred to in Article VI hereof, notwithstanding such release may cause a flow in said River in excess of FLORISTON RATES or REDUCED FLORISTON RATES (whichever shall be then in force); provided, however, that such releases shall not result in a flow at the intake of the Truckee Canal in excess of the then safe carrying capacity of said Canal.

(E) Release of water for removal of ice.

(1) Whenever during the months of December, January and February of any YEAR there shall be need of an additional flow of water to enable the Power Company to remove ice interfering the operation of its power plants, or any of them, the Irrigation District shall release from Lake Tahoe such additional amount of water as shall be requested of the United States and the Irrigation District by the Power Company for that purpose; however, that the

Irrigation District shall not be required to release for said purpose more water than sufficient to maintain a flow, available for the generation of power at the Fleish Plant, in excess of the rate of flow then in force at ICELAND GAGE, and in no event shall the flow at ICELAND GAGE exceed 500 cubic feet per second.

(2) The Conservation District shall, upon request of the Power Company, release into the Truckee River, during said months of December, January and February of any YEAR, SUPPLEMENTAL STORAGE WATER impounded prior to October 1 next preceding such release, for the purpose of removing ice; provided, however, that the Conservation District in any event shall not be required to release more water than sufficient to maintain a flow, available for the generation of power at the Fleish Plant, in excess of the rate of flow then in force at ICELAND GAGE, and in no event shall the flow at ICELAND GAGE exceed 500 cubic feet per second.

(F) Release of water from Lake Tahoe to prevent High Water Damage.

The parties hereto agree that the Irrigation District shall so operate the dam and controlling works at the outlet of Lake Tahoe as to prevent, insofar as practicable, the water surface of said lake from exceeding elevation 6229.1 feet above sea level. The procedure for regulating said lake to effect such result shall be as follows:

(1) Estimates of the maximum elevation which the water surface of Lake Tahoe would reach during the current season shall be made on or about March 1 and April 1 of

each year and at such other times as may be agreed upon, by the Irrigation District, Power Company and Conservation District. The estimated rise of the water surface elevation shall be based upon:

(a) The water content of the snow in Lake Tahoe Drainage Basin as determined by a joint snow survey of the Lake Tahoe area, which shall be made by the Irrigation District, Conservation District and Power Company on or about March 1st and April 1st of each year and at such other times as the said parties shall agree upon.

(b) The normal precipitation at Lake Tahoe between the date of such snow survey and the next following July 1st.

(c) The assumption that no water will be withdrawn through the outlet gates of Lake Tahoe after the date of such snow survey and prior to the date of the estimated maximum water surface elevation for the current calendar year.

(d) Existing physical and climatic conditions affecting the run-off into Lake Tahoe.

Provided, any snow survey data applicable and available from other reliable sources mutually satisfactory to the Irrigation District, Power Company and Conservation District, may be used in lieu of data which would otherwise be secured by the said joint surveys. The expense of the joint snow surveys and estimates shall be borne equally by the Irrigation District, the Power Company and the Conservation District.

(2) Whenever the estimated maximum water surface elevation of Lake Tahoe for the current calendar year, determined as provided in subparagraph (1) of this paragraph (F), is higher than 6230.0 feet above sea level, and notwithstanding the actual elevation of said lake at such time, the Irrigation District shall open the outlet gates of said lake and release of the maximum rate of flow possible, or at such lesser rate of flow as may be agreed upon by the Irrigation District, Conservation District and Power Company, an amount of water equivalent to the amount which it is estimated would be contained in said Lake above elevation 6230.0 feet above sea level. Whenever after such equivalent amount of water shall have been released, the actual water surface elevation of said Lake shall then be lower than 6228.0 feet above sea level, said outlet gates shall (unless otherwise agreed by the Power Company, Irrigation District and Conservation District) be closed by the Irrigation District, excepting only as may be required to maintain rates of flow provided for in this agreement.

(3) Whenever the water surface elevation of Lake Tahoe shall be higher than 6228.0 feet above sea level, the Irrigation District shall release from said Lake the maximum possible discharge therefrom (or such lesser rate of flow as may be agreed upon by the Irrigation District, the Conservation District and the Power Company) unless and until the last previous estimate of the maximum elevation of said water surface, as provided in subparagraph (1) of this paragraph (F), considered in conjunction with subsequent as well as anticipated withdrawals from said lake shall indicate that the maximum anticipated water surface

elevation for the current calendar year will not exceed 6229.1 feet above sea level.

(4) The quantity of water which may be released from Lake Tahoe under the conditions specified in subparagraphs (2) and (3) of this paragraph (F) shall not exceed the quantity which the United States is entitled to release from said Lake under the provisions of the 1915 DECREE; provided, however, that in the event it shall be necessary, in order to accomplish the purpose contemplated in subparagraphs (2) and (3) of this paragraph (F), to release a greater quantity than the United States may be entitled to withdraw under said 1915 DECREE, the Power Company and the United States agree that they will thereupon immediately petition the court for a temporary order permitting such additional necessary withdrawal of water from said lake as shall be required to prevent, so far as reasonably practicable, high water damage to property legally entitled to protection from such damage; and the Irrigation District shall so operate the existing facilities as to effect as far as possible, the additional releases permitted or directed in any such court order if and when entered.

(G) Release of ADDITIONAL SUPPLEMENTAL STORAGE WATER.

During the period commencing April 1 and ending September 10 next following of any YEAR, (provided all SUPPLEMENTAL STORAGE WATER shall have been first released), ADDITIONAL SUPPLEMENTAL STORAGE WATER shall be released for the same purposes and under the same conditions specified in this Article III for the release and use of SUPPLEMENTAL STORAGE WATER.

During the period commencing September 11 and ending January 31, next following of any YEAR, (provided all SUPPLEMENTAL STORAGE WATER impounded prior to October 1 of such year shall have been first released from SUPPLEMENTAL RESERVOIR), all ADDITIONAL SUPPLEMENTAL STORAGE WATER impounded prior to October 1 of such YEAR and remaining therein shall be released from SUPPLEMENTAL RESERVOIR, provided that the amount of water which would otherwise have been released from Lake Tahoe shall be reduced during such period by an amount equal, as nearly as practicable, to the amount of ADDITIONAL SUPPLEMENTAL STORAGE WATER so released during such period.

During the period commencing February 1 and ending March 31 next following of any YEAR, ADDITIONAL SUPPLEMENTAL STORAGE WATER impounded prior to the next preceding October 1 and remaining in SUPPLEMENTAL RESERVOIR may be released from or retained in SUPPLEMENTAL RESERVOIR at the option of the Conservation District. If the Conservation District shall elect to release such water in whole or in part, it will, insofar as may be reasonably practicable, so regulate such releases as to rates and periods of flow as to result in the greatest possible retention of water in Lake Tahoe.

ADDITIONAL SUPPLEMENTAL STORAGE WATER retained in SUPPLEMENTAL RESERVOIR after March 31 of any year shall retain its classification as ADDITIONAL SUPPLEMENTAL STORAGE WATER and only be released under the provision of this Paragraph (G) applicable to release of ADDITIONAL SUPPLEMENTAL STORAGE WATER.

ARTICLE IV. Impounding water in SUPPLEMENTAL RESERVOIR

(A) SUPPLEMENTAL STORAGE WATER.

The United States and the Irrigation District agree that the Conservation District shall have the right to impound in SUPPLEMENTAL RESERVOIR during the period commencing October 1 and ending September 30 next following of each YEAR after the OPERATIVE DATE OF THIS AGREEMENT, 25,000 acre feet of TRUCKEE CANAL WATER, subject, however, to the following conditions:

(1) Said TRUCKEE CANAL WATER shall be impounded under conditions which will not result in the NATURAL FLOW OF the Truckee River at ICELAND GAGE being reduced below FLORISTON RATES of flow, exclusive of releases from Lake Tahoe.

(2) The right to impound TRUCKEE CANAL WATER in SUPPLEMENTAL RESERVOIR during any such period shall terminate (except as provided in paragraph (B) of this Article IV) when the amount of SUPPLEMENTAL STORAGE WATER impounded during such period and then in said reservoir, plus the amount of such water released from SUPPLEMENTAL RESERVOIR after March 31 of such period for the purpose of maintaining FLORISTON RATES, equals 25,000 acre feet.

(B) ADDITIONAL SUPPLEMENTAL STORAGE WATER

It is further agreed by the United States, the Irrigation District and the Power Company that the Conservation

District shall have the right after the OPERATIVE DATE OF THIS AGREEMENT to impound Truckee Canal Water in SUPPLEMENTAL RESERVOIR up to the capacity of said reservoir, in addition to any such water impounded under the provisions of paragraph (1) and (2) of Paragraph (A) of this Article; provided that such additional TRUCKEE CANAL WATER may only be impounded when the impounding thereof will not reduce the water available for diversion by the Truckee Canal below the then existing carrying capacity of said Canal (limited, however, to the maximum diversion of 1200 cubic feet per second at the intake of said canal).

(C) (1) GENERAL CONDITIONS

The Conservation District agrees that it will use every effort to so operate its SUPPLEMENTAL RESERVOIR as to permit the maximum possible diversion of TRUCKEE CANAL WATER by the Irrigation District in so far as, in the judgment of the Conservation District can be done without detriment to the impounding in SUPPLEMENTAL RESERVOIR of water which the Conservation District is entitled to impound therein under the terms of this agreement, or otherwise.

(2) If, during the period commencing October 1 and ending September 30 of the initial YEAR after the OPERATIVE DATE OF THIS AGREEMENT, (a) the amount of water impounded in SUPPLEMENTAL RESERVOIR exceeds 25,000 acre feet and includes any TRUCKEE CANAL WATER, and (b) a shortage of water for the irrigation of lands under Lahontan Reservoir exists or is imminent during such initial YEAR then such excess water

(limited, however, to the amount of TRUCKEE CANAL WATER so impounded as hereinabove provided in this Paragraph (A), shall be released at such time or times during said initial YEAR, and at such rate or rates of flow, as may be requested by the Irrigation District.

(3) The Conservation District agrees to operate SUPPLEMENTAL RESERVOIR at all times so as to effect the storage therein of the greatest quantity of water possible under the provisions of this agreement.

ARTICLE V. Diversion by Power Company from Truckee River into Highland Ditch and from Hunter Creek.

(A) Diversion by Power Company from Truckee River for MUNICIPAL AND DOMESTIC USES.

(1) The Power Company shall have the right after the OPERATIVE DATE OF THIS AGREEMENT to divert from DIVERTED FLOW to which the United States, the Irrigation District, the Conservation District and the parties of the fifth part herein are entitled, such quantity of water (after first utilizing therefor all the waters allocated to the Power Company for MUNICIPAL AND DOMESTIC USES from the Truckee River and Hunter Creek under the TRUCKEE RIVER FINAL DECREE and the 1915 DECREE) as shall be necessary to supply the requirements for such uses in the City of Reno and the City of Sparks (including the suburbs of said cities and areas contiguous to, or near the same, but outside their respective legal boundaries, which are now or hereinafter may be served by the Power Company with water for such uses); provided, however, that the maximum amount of water which the Power Company shall be entitled to divert from

the Truckee River for such uses under the foregoing provisions and the TRUCKEE RIVER FINAL DECREE and the 1915 DECREE shall not exceed a flow of 40 cubic feet per second measured at the point or points of diversion from the Truckee River. Water for MUNICIPAL AND DOMESTIC USES shall be diverted by the Power Company under the following conditions only, to wit:

(a) All water diverted for MUNICIPAL AND DOMESTIC USES shall be chargeable to the portion of DIVERTED FLOW allocated to the Power Company and the Irrigation District by the provisions of subparagragh (1) of Paragraph (A) of Article VII hereof;

(b) Whenever the quantity of water diverted by the Power Company for MUNICIPAL AND DOMESTIC USES as provided in subdivision (a) of this subparagraph (1) is less than 40 cubic feet per second and is insufficient to fully meet the requirements of the Power Company for such uses, or such water (or any part thereof) is for any reason whatsoever not available for diversion into the Highland Ditch, then and in either of such events, the Power Company shall be entitled to divert into said Highland Ditch from DIVERTED FLOW allocated to the Parties first mentioned in subparagraph (2) of Paragraph (A) of Article VII hereof a flow of water sufficient to supply such deficiency; and

(c) Whenever the quantity of water needed to meet the requirements of the Power Company for MUNICIPAL AND DOMESTIC USES referred to in this sub-

paragraph (1) cannot be fully supplied from DIVERTED FLOW as provided in subdivisions (a) and (b) of this subparagraph (1), the Power Company may divert from TRUCKEE CANAL WATER such amount of water as may be required to fully meet its requirements for MUNICIPAL AND DOMESTIC USES up to, but not exceeding 40 cubic feet per second.

(2) The Power Company agrees that after the OPERATIVE DATE OF THIS AGREEMENT that:

(a) Its right, as fixed by the TRUCKEE RIVER FINAL DECREE and this agreement, to divert water into the Highland Ditch for MUNICIPAL AND DOMESTIC USES shall be limited, as to the rights of the parties hereto as defined in the TRUCKEE RIVER FINAL DECREE and/or acquired under the terms of this agreement, to 40 cubic feet per second;

(b) It waives, as to the parties hereto only, any and all rights which it now possesses to divert into the Highland Ditch for MUNICIPAL AND DOMESTIC USES water released from Lake Tahoe into the Truckee River in excess of forty (40) cubic feet per second, subject, however, to the provisions of subparagraph (1) of this Paragraph (A); and

(c) It waives, as to the parties hereto only, any and all rights which it now possesses to use for irrigation water (other than NATURAL FLOW) released into the Truckee River from Lake Tahoe.

The waivers contained in the foregoing subdivisions (a), (b) and (c) of this subparagraph (2) are limited to rights

of the Power Company only; and nothing in this subparagraph (2) contained shall be construed as a waiver, or attempted waiver, by the Power Company of any of the rights of, or dedicated to, any irrigator under the Highland Ditch or of any person other than itself.

(B) Diversion into Highland Ditch to remove Ice.

The Power Company shall have the right to divert from the Truckee River into the Highland Ditch at any time or times during the months of December, January and February of any YEAR after the OPERATIVE DATE OF THIS AGREEMENT, any amount of water in said River, in addition to that hereinabove in this Article V mentioned, which is necessary for the purpose of removing ice from said Highland Ditch (but for no other purpose); provided that in the event of the exercise of such right, the Power Company shall immediately after such use return said water, or a like quantity thereof to said River.

(C) Diversion from Hunter Creek for MUNICIPAL AND DOMESTIC USES.

Notwithstanding anything to the contrary contained in this agreement, the Power Company shall have the right to divert water from Hunter Creek for MUNICIPAL AND DOMESTIC USES in the amounts and with the priorities provided in the TRUCKEE RIVER FINAL DECREE.

ARTICLE VI. 4,000 acre feet of TRUCKEE CANAL WATER for power use.

(A) Storage of 4,000 acre feet of TRUCKEE CANAL WATER by Power Company.

The Power Company shall have the right (to be exercised during the period commencing March 1 and ending August 1 of any YEAR after the OPERATIVE DATE OF THIS AGREEMENT) to divert TRUCKEE CANAL WATER and store the same in any reservoir or reservoirs in the Truckee River Water Shed above ICELAND GAGE (exclusive of the Lake Tahoe Water Shed), with a priority junior to SUPPLEMENTAL STORAGE WATER, up to but not exceeding 4,000 acre feet (which water shall be in addition to the 40 second feet mentioned in Article V hereof), subject, however, to the following conditions:

(1) Said 4,000 acre feet of water may be diverted and impounded only from NATURAL FLOW in excess of FLORISTON RATES, exclusive of releases from Lake Tahoe;

(2) The diversion and storage of said 4,000 acre feet of water, or any part thereof, may be made only at such time or times and in such manner as not to interfere with the storage of SUPPLEMENTAL STORAGE WATER as provided for in Article IV hereof;

(3) If in any such YEAR the Power Company shall divert and store in any such reservoir or reservoirs, all or any part of said 4,000 acre feet of water, it shall, during the period commencing the 1st day of October next following such diversion and storing, and ending the last day of the next succeeding February, release

into the Truckee River the amount of TRUCKEE CANAL WATER remaining in such reservoir or reservoirs, which was so diverted and stored during such YEAR;

(4) No diversion shall be made for the purpose of the initial storage of said 4,000 acre feet of water, or part thereof, in the event that the Irrigation District shall determine that the diversion and storage of said initial 4,000 acre feet, or part thereof, will be detrimental to its Lahontan Reservoir water supply during the period commencing April 1 and ending October 31 of the YEAR in which such initial storage is proposed to be made.

(5) The diversion and storage by the Power Company of said 4,000 acre feet of water or part thereof, in any YEAR after the diversion and storage of said initial 4,000 acre feet, or part thereof, shall be subject to the condition that the Power Company may not impound in any year a quantity of TRUCKEE CANAL WATER in excess of the amount of water released during the next preceding YEAR in accordance with subparagraph (3) of this Paragraph (A), excepting only with the permission of the Irrigation District and in conformity with the conditions set forth in this subparagraph (5), and in subparagraph (6) of this Paragraph (A).

(6) If the Power Company shall have impounded in such reservoir or reservoirs PRIVATELY OWNED STORED WATER other than TRUCKEE CANAL WATER and shall have released the same into the

Truckee River (for diversion into the Truckee Canal at rates of flow which will not result in a flow at the intake of said Canal in excess of its then safe carrying capacity) during the period commencing October 1 and ending the last day of the next following February of any YEAR, then and in that event the Power Company shall be entitled (without obtaining further permission of the Irrigation District and notwithstanding the provisions of subparagraph (5) of this Paragraph (A) to store during the period commencing March 1 and ending August 1 of the next succeeding YEAR in which such storage shall have been made, an amount of TRUCKEE CANAL WATER (limited however to 4,000 acre feet) equivalent to the quantity so released; and

(7) The Power Company shall at all times exert its best endeavors to so operate its said reservoir or reservoirs as to permit the maximum possible diversion of TRUCKEE CANAL WATER by the Irrigation District, in so far as in the judgment of the Power Company such operation is practicable, without detriment to the impounding in said reservoir or reservoirs of water which the Power Company is entitled to impound therein under this agreement, or otherwise.

(B) Release of 4,000 acre feet of TRUCKEE CANAL WATER.

Any TRUCKEE CANAL WATER diverted from the Truckee River and/or its tributaries after the OPERATIVE DATE OF THIS AGREEMENT and impounded by the Power Company pursuant to Paragraph (A) of this

Article VI may (subject to subparagraph (4) of Paragraph (A) of Article III) be released into said River in lieu of drafts from Lake Tahoe and/or SUPPLEMENTAL STORAGE WATER, provided the Irrigation District, and the Power Company shall both consent to such release. In the event that the Irrigation District and the Power Company shall give such consent, the Power Company shall give the United States and the Irrigation District such notice relative to the reduction of flow below FLORISTON RATES of flow as may be deemed by it necessary to effect such reduction under the provisions of the 1915 DECREE.

(C) Power Company to obtain no right of Ownership to 4,000 acre feet of TRUCKEE CANAL WATER.

The Power Company shall acquire no right of ownership in or to the said 4,000 acre feet of TRUCKEE CANAL WATER stored by it pursuant to Paragraph (A) of this Article VI, but the ownership thereof shall remain in the United States; provided, however, that said water shall be subject to the use in Paragraph (A) of this Article VI provided. The right to divert said 4,000 acre feet when released shall accrue only to the Irrigation District and the Power Company, and said water when diverted by the Power Company shall be used for the generation of power only.

ARTICLE VII. Allocation of DIVERTED FLOW of Truckee River after OPERATIVE DATE OF THIS AGREEMENT

(A) Allocation.

All of the parties hereto agree that from and after the OPERATIVE DATE OF THIS AGREEMENT the rights to the use at all times of DIVERTED FLOW of the Truckee River shall, for the purposes of this agreement, be allocated:

(1) To the Irrigation District, for use upon the Carson and Truckee Divisions of the Newlands Reclamation Project, and (to the extent provided in subparagraph (1) of Paragraph (A) of Article V of this agreement) to the Power Company, and their respective successors in interest, on the one hand, and

(2) To the Conservation District and to the owners (as defined in the TRUCKEE RIVER FINAL DECREE), and their successors in interest, of rights to use water diverted from the Truckee River for use upon lands entitled to water under the provisions of the TRUCKEE RIVER FINAL DECREE, for irrigation, domestic and stock watering purposes and located between ICELAND GAGE and Derby Dam (including use upon the additional lands referred to in Article VIII of this agreement), subject, however, to the rights of the Power Company for MUNICIPAL AND DOMESTIC USES as provided in subdivision (b) of subparagraph (1) of Paragraph (A) of Article V of this Agreement, on the other hand, in the following manner, to wit: The right to the use of thirty-one (31) per cent of such DIVERTED FLOW is hereby allocated to the persons and

for the uses provided in subparagraph (1) of this Paragraph (A), and the rights to the use of the remaining sixty-nine (69) per cent of such DIVERTED FLOW is hereby allocated to the persons and for the uses provided in subparagraph (2) of this Paragraph (A); provided, always, that at any time when the right to use any portion of the sixty-nine (69) per cent of DIVERTED FLOW is not being fully exercised for the uses provided in subparagraph (2) of this paragraph (A), and by reason of such fact there shall exist a flow of water available for diversion at Derby Dam in excess of the amount to which the Irrigation District is entitled at such time under the provisions of the TRUCKEE RIVER FINAL DECREE and/or this agreement, the Irrigation District shall have the right to divert and use such excess for its own purposes.

The Conservation District shall be entitled (subject to subdivision (b) of subparagraph (1) of Paragraph (A) of Article V hereof) to the use of all water included in said sixty-nine (69) per cent of DIVERTED FLOW referred to in subparagraph (2) of Paragraph (A) of this Article, which is in excess of the NATURAL FLOW therein.

The waters flowing in the Truckee River (other than NATURAL FLOW) to which the Conservation District shall be entitled under the terms of this agreement shall be divided and allocated by it for the benefit of the lands within the Conservation District in the manner provided by law and this agreement.

(B) Priorities.

Whenever, in order to carry out and effect the allocation provided for in Paragraph (A) of this Article VII, it shall

be necessary that any limitation be made upon the quantity of water which any of the parties may divert, such limitation shall be made upon the quantities of water which the parties of the fifth part may divert and in the order of the priorities of said parties of the fifth part as such priorities are defined in the TRUCKEE RIVER FINAL DECREE, and in such case a quantity of water equal to the amount of such limitation shall accrue and be applied to the uses of the Irrigation District and the Power Company, as provided in subparagraph (1) of Paragraph (A) of this Article VII.

ARTICLE VIII. Limitation of area irrigated within the Conservation District.

The parties hereto agree that the additional land upon which any portion of the sixty-nine (69) percent of DIVERTED FLOW, as provided in subparagraph (2) of ARTICLE VII hereof and/or any PRIVATELY OWNED STORED WATER of the Conservation District, may be used, shall be limited to lands now or hereafter situate wholly within the boundaries of the Conservation District and contiguous to lands possessing rights to the use of water diverted from the Truckee River under the provisions of the TRUCKEE RIVER FINAL DECREE; provided, however, that the total area of such additional lands shall not exceed five (5) per cent of the total area between ICELAND GAGE and Derby Dam entitled to the use of water of the Truckee River, as such area is defined in the TRUCKEE RIVER FINAL DECREE.

ARTICLE IX. Releases and diversions of PRIVATELY OWNED STORED WATER.

Whenever after the OPERATIVE DATE OF THIS AGREEMENT, PRIVATELY OWNED STORED WATER belonging to or controlled by any of the parties hereto shall be released intc the Truckee River or its tributaries, an amount of water equal to the amount so released shall be delivered to the point or points of diversion from said River designated by the party making such release as provided in the TRUCKEE RIVER FINAL DECREE; provided, however, that no deductions for transportation losses shall be made.

ARTICLE X. TRUCKEE RIVER FINAL DECREE.

The parties hereto hereby consent and agree that after the OPERATIVE DATE OF THIS AGREEMENT a final decree may be entered by the District Court of the United States in and for the District of Nevada in said cause entitled, "United States of America, plaintiff, vs. Orr Water Ditch Company, defendant, In Equity No. A-3," embodying (among other appropriate provisions) the findings relative to the rights of the parties set forth in said Temporary Restraining Order in the Truckee River Adjudication Suit, modified, however, as provided in the stipulation hereinafter in this Article X mentioned. The parties hereto agree, simultaneously with the execution of this agreement, to execute a stipulation in the form of stipulation annexed hereto, made a part hereof and marked Exhibit A consenting to the entry of such final decree when the conditions of said stipulation have been fulfilled.

When said stipulation shall have been signed as hereinabove provided in this Article X by the United States, the Irrigation District, the Conservation District, the Power Company and by the parties of the fifth part herein who, under the provisions of said Temporary Restraining Order are entitled to divert water from the Truckee River for the irrigation of lands within the Conservation District, whose diversion rights (computed in acre feet per annum) aggregate not less than seventy (70) per cent of the total diversion rights (similarly computed) within the Conservation District for irrigation from the Truckee River, or their successors in interest, said stipulation, together with two executed copies of this agreement shall forthwith be deposited with First National Bank of Reno, together with escrow instructions in substantially the form of the escrow instructions attached hereto and marked Exhibit B, signed by the parties hereto, or their duly authorized representatives. The parties of the fifth part, and each of them, hereby irrevocably authorize and direct the Conservation District to sign such instructions on their behalf and also to make the request hereinafter in this Article X mentioned for the entry of said final decree in said Truckee River Adjudication Suit.

When the notice, certificates and permits referred to in subparagraphs (1), (2), (3), (4) and (5) of Paragraph (B) of Article XX shall have been executed and issued, said notice, certificates and permits, or certified copies thereof, shall be filed with said Bank, and said Bank shall thereupon (1) cause one of said duplicate copies of this agreement to be recorded in the office of the Recorder of Washoe County, State of Nevada, and (2) file with the United

States District Court for the District of Nevada in said Truckee River Adjudication Suit the remaining executed duplicate copy of this agreement, together with said stipulation; and within thirty (30) days after the filing of said stipulation with said Clerk (or as soon thereafter as the engagements of said United States District Court will permit) the parties shall request said Court to enter a final decree in said Truckee River Adjudication Suit in accordance with said stipulation. When said duplicate executed copy of said agreement shall have been recorded, said copy shall be delivered to the United States, from which a certified copy will be obtained and placed in the custody of some proper person to be designated in writing by the Irrigation District, the Conservation District, and the Power Company, and shall be subject at all reasonable hours to the inspection of any party to this agreement. The custodian so designated may be changed from time to time by a writing signed by the Irrigation District, the Conservation District and the Power Company.

If said Court shall decline to enter final judgment in accordance with said stipulation in the form in which the same shall be so filed, and shall direct that in the entry of said decree any change shall be made in the provisions of said decree affecting the rights of any party to this agreement, then and in that event such change shall be forthwith submitted to the party or parties directly affected thereby, and if such party or parties, together with the United States, the Conservation District, the Irrigation District and the Power Company, shall approve such change, a supplemental stipulation amending said original stipulation and signed by the United States, the Conservation District,

the Irrigation District and the Power Company and by such other party or parties hereto as shall be directly affected by such change, shall be filed with said Court. The entry of a final decree embodying the terms of said original stipulation as modified by said supplemental stipulation shall for all purposes of this agreement have the same effect as herein provided in the case of the entry of a final decree in accordance with said original stipulation. In the event that owing to the absence of any party of the fifth part, or for any other reason, it shall be impracticable, in the judgment of the Conservation District, to give personal notice to any such party of any such proposed change under the provisions of this Article X, the Conservation District may cause to be published, at least once a week for two weeks, in a newspaper of general circulation published in the County of Washoe, State of Nevada, a notice of such proposed change, and such publication shall be deemed for all purposes the equivalent of actual notice to such party.

ARTICLE XI. Rights of the United States to use of water of Truckee River upon Pyramid Lake Indian Reservation Lands

Provision shall be made in the Truckee River final decree, for the rights of the United States to the use of water from the Truckee River for the irrigation of Indian lands within the Pyramid Lake Indian Reservation by inserting in the final decree the following language:

Claim No. 1. By order of the Commissioner of the General Land Office made on December 8, 1859, the lands comprising the Pyramid Lake Indian Reservation were withdrawn from the public domain for use and benefit of the

Indians and this withdrawal was confirmed by order of the President on March 23, 1874. Thereby and by implication and by relation as of the date of December 8, 1859, a reasonable amount of the water of the Truckee River, which belonged to the United States under the cession of territory by Mexico in 1848 and which was the only water available for the irrigation of these lands, became reserved for the needs of the Indians on the reservation.

For the irrigation of 3130 acres of Pyramid Lake Indian Reservation bottom lands, plaintiff, the United States of America, is entitled and allowed to divert from the Truckee River through the Indian Ditch, the intake of which is on the left bank of the river in Section 18, T. 22 N., R. 24 E., Mount Diablo Base and Meridian, not exceeding 58.7 cubic feet of water per second to an amount not exceeding 14,742 acre feet of water in any calendar year with a priority of December 8, 1859; provided the amount of water as to be diverted shall not exceed a flow of one miner's inch, or one-fortieth of one cubic foot per second per acre for the aggregate number of acres of this land being irrigated during any calendar year and the amount of water applied to the land after an estimated transportation loss of 15 percent, shall not exceed 85-100 of an inch or 85-100 of one-fortieth of one cubic foot per second for the total number of acres irrigated, and provided that the amount of water so diverted during any such year shall not exceed 4.71 acre feet per acre for the aggregate number of acres of this land being irrigated during that year, and further provided that the amount of water applied to the land shall not exceed four acre feet per acre for the aggregate number of acres of this land being irrigated during any calendar year.

This water is allowed for the United States and for the Indians belonging on said reservation and for their use and benefit and is not allowed for transfer by the United States to homesteaders, entrymen, settlers or others than the Indians in the event that said lands are released from the reservation or are thrown open to entry or other disposal than assignment or transfer to the Indians.

Claim No. 2. In addition to water for the above mentioned 3130 acres of Pyramid Lake Indian Reservation bottom lands, the Government is hereby and will be allowed to divert water from the Truckee River, with a priority of December 8, 1859, to the amount of one-fortieth of one cubic foot per second per acre for the irrigation of 2745 acres of Pryamid Lake Indian Reservation bench lands. The water so allowed for bench lands may be diverted from the Truckee River through the Truckee Canal or any other ditch now or hereafter constructed as the plaintiff may desire or authorize; provided that the amount of water for bench lands shall not exceed during any calendar year 5.59 acre feet per acre diverted from the river, nor exceed during any calendar year 4.1 acre feet per acre applied to the lands, for the aggregate number of acres of this land being irrigated during any year.

This water is allowed for the United States and for the Indians belonging on said reservation and for their use and benefit and is not allowed for transfer by the United States to homesteaders, entrymen, settlers or others than the Indians in the event that said lands are released from the reservation or are thrown open to entry or other disposal than assignment or transfer to the Indians.

ARTICLE XII. Withdrawal of protest against granting of Application Nos. 5169 and 6534 filed with California Division of Water Rights

On or before the OPERATIVE DATE OF THIS AGREEMENT the Irrigation District and the Power Company shall withdraw their protests filed with the California Division of Water Rights against the granting of Applications Nos. 5169 and 6534.

ARTICLE XIII. Recognition of right of Irrigation District to enlarge Truckee Canal to a capacity of 1200 cubic feet per second and to increase capacity of Lahontan Reservoir.

The Power Company, Conservation District and the parties of the fifth part, and each of them, waive all objections to the restoration and maintenance of the Truckee Canal by the Irrigation District and/or the United States to a carrying capacity of not exceeding 1200 cubic feet per second. The Power Company, Conservation District, and the parties of the fifth part, and each of them further waive any objection to the increase of the storage capacity of Lahontan Reservoir and agree that such increase of storage capacity thereof may be made by the Irrigation District. Nothing in this Article XIII contained shall operate as a waiver by the Conservation District of any rights it may have under Applications Numbers 5169 and 6534 filed with the California Division of Water Rights.

ARTICLE XIV. Excuses for non-performance and delay in performance.

No party hereto shall be liable for failure to perform, or delay in performing, any condition or agreement hereunder, if such failure shall be due to an act of God, war, earthquake, failure or refusal of the proper authorities to issue any permit, certificate, notice, order or document, the issuance of which by law is or shall be a condition precedent to the performance of such condition or agreement, injunctions, court orders, writs, processes or judgments, or other cause or causes beyond the control of such party; and in the event that any such cause shall delay the performance of any condition or agreement (other than those mentioned in Paragraph (a) of Article XX hereof relating to the time within which this agreement shall become operative) which any party shall be obligated to perform, or cause to be performed, under the terms of this agreement, the time of such party to perform the same shall be extended for a period equal to the time during which such cause shall be operative.

ARTICLE XV. 1915 DECREE not to be affected by this agreement.

Nothing contained in this agreement is intended to modify, abrogate, alter or consent to the modification, abrogation or alteration of any of the terms and provisions of the 1915 DECREE; and all of the parties hereto, from and after the OPERATIVE DATE OF THIS AGREEMENT (but not prior thereto), confirm all the rights of the United States and the Power Company as defined and set forth in said DECREE. All of the parties hereto further stipulate and agree that the regulation and use of the waters

of the Truckee River and its tributaries (including Lake Tahoe) in accordance with this agreement shall not be construed as conflicting with any of the provisions of the 1915 DECREE. All of the parties hereto hereby covenant and agree that they will not, nor will any of them, claim or contend in any judicial or other proceeding or otherwise that the regulation or use of the waters of the Truckee River and its tributaries (including Lake Tahoe) as provided in this agreement is or will be inconsistent with or forbidden by any provision of the 1915 DECREE.

ARTICLE XVI. Agreement between United States and Irrigation District dated December 18, 1926, to remain in effect.

As between the United States and the Irrigation District none of the provisions of the contract entered into between the United States and the Irrigation District dated December 18, 1926, shall be deemed to have been in any wise altered, changed, modified or abrogated by the execution of this agreement; provided, however, that the United States and the Irrigation District hereby consent to all changes (if any there be) in the method of regulation and the manner of use of the waters of the Truckee River and its tributaries (including Lake Tahoe) and also to the construction and operation of certain reservoirs, made or provided for in this agreement; and the Irrigation District hereby waives all claims upon the United States on account thereof.

ARTICLE XVII. Provisions of this agreement not to limit or affect rights of Power Company to use of waters of Lake Tahoe and/or Truckee River for generation of electric power.

The parties hereto consent and agree (notwithstanding anything to the contrary contained in this agreement) that at all times after the OPERATIVE DATE OF THIS AGREEMENT the Power Company shall be entitled to use for the development of electric power and in meeting its contractual obligation to supply water to Crown Willamette Paper Company, a Delaware corporation (successor of Floriston Land and Power Company and Floriston Pulp and Paper Company), and its successors, under the contract dated November 2, 1908 between Truckee River General Electric Company, Floriston Land and Power Company and Floriston Pulp and Paper Company recorded in the office of the County Recorder of the County of Nevada, State of California in Liber 108 of Deeds at page 630, any of the water flowing in the Truckee River (including PRIVATELY OWNED STORED WATER). The Power Company shall also have the exclusive right to divert for said purpose of developing electic power all SUPPLEMENTAL STORAGE WATER at any point or points in the Little Truckee River and/or the Truckee River between SUPPLEMENTAL RESERVOIR and ICELAND GAGE. Nothing contained in this agreement shall constitute a waiver or abandonment of any existing rights of the Power Company to the use of water released from Lake Tahoe and/or of water of the Truckee River for the development of electric power. PROVIDED, ALWAYS, HOWEVER, that water used by the Power Company for the develop-

ment of electric power and water used by said Crown Willamette Paper Company, or its successors, for the operation of its said mills and works shall be returned to the Truckee River immediately after such use.

ARTICLE XVIII. Provisions relative to the appointment of Water Administrator and to compilation of data.

(A) Appointment of Water Administrator.

If the Conservation District, the Irrigation District and the Power Company shall at any time hereafter deem it desirable that a Water Administrator be employed for the purpose of assisting in carrying out in the State of California the provisions of this Agreement, said three parties, may, by an instrument in writing signed by them, employ such Administrator (who may, but shall not be required to be, the Water Master appointed under the provisions of the TRUCKEE RIVER FINAL DECREE) and shall define his duties, fix his compensation and prescribe the terms and conditions of his employment.

(B) Compilation of data.

The Water Master appointed under the provisions of the TRUCKEE RIVER FINAL DECREE shall be permitted by the parties hereto to have access at all reasonable hours to the records and data kept or acquired by them respectively in connection with their operations under this agreement, in order that said Water Master may compile such data and information as may be necessary or useful in connection with the allocation and distribution of water stored pursuant to the provisions of this agreement and with the flowage in the Truckee River and its tributaries.

ARTICLE XIX. Method of giving notice or making request.

Any notice, request or permission herein provided to be given or made shall be given or made in writing and shall be either forwarded by United States mail or delivered to the party or parties to or for whom it shall be given or made, and copies or originals of all such notices, requests or permissions shall be promptly mailed or delivered to the United States, the Conservation District, the Irrigation District, the Power Company and the Water Master referred to in Paragraph (B) of Article XVIII, and, if any Water Administrator shall have been appointed pursuant to the provisions of Article XVIII hereof, then also to such Administrator.

ARTICLE XX. Provisions relative to time when and conditions under which agreement becomes operative.

(A) Time when Article I, Paragraphs (A) and (B) and subparagraph (1) of Paragraph (D) of Article II and Article XIV of this agreement become operative.

Upon this agreement and the stipulation for entry of final decree mentioned in Article X hereof being duly executed prior to December 31, 1936 (or if such time be extended in accordance with the provisions of this agreement, then within such extension) by the United States, the Irrigation District, the Conservation District, the Power Company and by parties of the fifth part herein who, under the provisions of the Temporary Restraining Order in said Truckee River Adjudication Suit are entitled to divert water from said River for the irrigation of lands within the Conservation District and whose diver-

sion rights (computed in acre feet per annum) aggregate not less than seventy (70) per cent of the total diversion rights (similarly computed) within the Conservation District for irrigation from the Truckee River, or by their successors in interest, the provisions of Article I, Paragraphs (A), (B) and sub-paragraph (1) of Paragraph ( ) of Article II, Article XII, Article XIII and Article XIV of this agreement, and such provisions only shall immediately be and become effective and in operation.

(B) Time when remaining provisions of this agreement become operative.

This agreement shall become operative as to each and every remaining provisions thereof whether or not it be specifically recited in words or substance that such provisions shall be effective from and after the OPERATIVE DATE OF THIS AGREEMENT, and thereupon shall be and remain operative as to all of its provisions, upon and only upon the following conditions being complied with on or prior to March 1, 1936, (or if such time be extended in accordance with this agreement, then within such extension), to wit:

(1) The Secretary of the Interior of the United States shall have issued a certificate or notice stating that SUPPLEMENTAL RESERVOIR is available for the storage of water;

(2) The Department of Public Works of the State of California (or other officer, bureau or commission of the State of California exercising functions similar to those exercised by said Department) shall have issued its final permit approving the construction of the dam of the Conservation District at SUPPLE-

MENTAL RESERVOIR, if such permit be required by law;

(3) The Department of Public Works of the State of California, or the State Engineer of the State of California, or the State Engineer of the State of Nevada or the Chief Engineer of the Bureau of Reclamation of the United States (or other officer, bureau or commission exercising functions similar to those exercised by said Department or said Engineers, respectively) shall have issued a certificate that SUPPLEMENTAL RESERVOIR has been completed and has the capacity and conforms to the other conditions relating thereto specified in Paragraph (B) of Article II hereof;

(4) The Department of Public Works of the State of California (or other officer, bureau or commission of the State of California exercising functions similar to those exercised by said Department) shall have issued its final permit approving the construction of the dam at the PONDAGE reservoir of Power Company, if such permit be required by law; and

(5) The Department of Public Works of the State of California, or the State Engineer of the State of California, or the State Engineer of the State of Nevada, or the Chief Engineer of the Bureau of Reclamation of the United States (or other officer, bureau or commission exercising functions similar to those exercised by said Department or said Engineers, respectively) shall have issued a certificate that PONDAGE has been completed and conforms to the conditions relating thereto specified in Paragraph (A), and

subparagraph (1) of Paragraph (D) of Article II hereof.

The date when all of said remaining provisions shall become effective as hereinabove provided is herein referred to as the OPERATIVE DATE OF THIS AGREEMENT.

The periods of time herein prescribed within which this agreement shall be executed and/or the notice, certificates and/or permits referred to in subparagraphs (1), (2), (3), (4) and (5) of this Paragraph (B) shall be executed and issued may be extended from time to time by a writing signed by the Irrigation District, the Conservation District and the Power Company; and in the event that the Conservation District or the Power Company (as the case may be) is actually engaged in prosecuting with due diligence the work of constructing SUPPLEMENTAL RESERVOIR, or PONDAGE (as the case may be), such parties, respectively, shall be entitled of right to extension of time for the completion thereof, effective so long as said work shall be so prosecuted.

PONDAGE shall be deemed to have been completed within the meaning of this agreement when the certificates and permit referred to in subparagraphs (4) and (5) of this Paragraph (B) shall have been issued.

SUPPLEMENTAL RESERVOIR shall be deemed to have been completed within the meaning of this agreement when the notice, certificates and permits referred to in subparagraphs (1), (2) and (3) of this Paragraph (B) shall have been issued.

If, on or before March 1, 1936 (or if such date be extended, then before the expiration of such extension) the

conditions specified in subparagraphs (1), (2), (3), (4) and (5) of Paragraph (B) of this Article XX shall not have been fulfilled, either the Irrigation District, the Conservation District or the Power Company (if not in default in the performance of its obligation hereunder) shall be entitled, at its option, to terminate this agreement by giving written notice of such termination to the other parties to this agreement (exclusive of the parties of the fifth part) and in such case each of the parties hereto (including the parties of the fifth part) shall be restored to his rights and position as the same existed at the date hereof unaffected by any of the provisions of this agreement; provided, however, that nothing herein contained shall constitute or be deemed a waiver by any of the parties hereto of any right such party may have to recover damages from any party who shall have failed, without lawful excuse, to perform this agreement on its part, or to invoke such other remedy in relation thereto as it may deem advisable.

ARTICLE XXI. Provisions of Agreement to apply to and bind heirs, administrators, successors and assigns of parties.

The provisions of this agreement shall be binding upon the parties hereto (including the nominees referred to in Article II hereof), their heirs, administrators, successors and as signs, and whenever in this agreement reference is made to any of the parties hereto or to any such nominees, such reference shall include such party and nominee, his heirs, administrators, successors or assigns, unless the context shall indicate otherwise.

ARTICLE XXII. Obligation of parties to this agreement is several.

The obligation of the parties to this agreement is several and not joint, and no party hereto shall be liable directly or indirectly for or in respect of any action taken or to be taken hereunder or for any money borrowed or to be borrowed or liability incurred or assumed, or to be incurred or assumed by any other party hereto (including any nominee referred to in Article II hereof) for the purpose of carrying out this agreement, or otherwise, but nothing in this Article contained, shall operate to exempt any party hereto from the payment of any taxes or assessments lawfully levied or to be levied on any property of such party.

ARTICLE XXIII. PRIVATELY OWNED STORED WATER

Except as otherwise expressly provided in this agreement, PRIVATELY OWNED STORED WATER shall not be subject to the terms of this agreement; and wherever the terms "water" and/or "rate of flow" are used herein without words expressly indicating that such terms refer to or arise either in whole or in part, from PRIVATELY OWNED STORED WATER, such reference shall be deemed not to include or refer to PRIVATELY OWNED STORED WATER.

ARTICLE XXIV. Rights of Non-Signers of Agreement not to be affected hereby.

Nothing herein contained shall be construed to limit the rights of any user of water of the Truckee River who shall not execute this agreement.

ARTICLE XXV. Miscellaneous.

(A) The parties hereto agree diligently and in good faith to cooperate with each other for the purpose of carrying out the provisions of this agreement, and to that end, the Irrigation District shall, so long as it shall be permitted to remain in control thereof, operate the gates and controlling works at the outlet of Lake Tahoe as herein provided and prescribed, and the Conservation District and the Power Company, respectively, shall operate SUPPLEMENTAL RESERVOIR and PONDAGE in accordance with the provisions hereof, and all of the parties hereto shall in good faith perform all agreements, obligations and covenants herein assumed or agreed to be performed by them respectively.

The Irrigation District, the Conservation District and the Power Company shall each keep adequate records pertaining to their operations under this agreement and, upon request of any of said parties or the Water Master referred to in Paragraph (B) of Article XVIII hereof, such records shall be made available to the party making request therefor.

(B) Nothing contained in this agreement shall preclude any of the parties hereto from acquiring hereafter in the manner provided by law, rights to the use of water in addition to the rights now possessed by them respectively.

Nothing herein contained shall preclude any of the parties hereto from diverting water from the Truckee River Water Shed from another water shed, and the party so diverting the same shall have all of the rights in respect of water so diverted which are or may be provided by law.

(C) The parties hereto agree that in the event the Power Company should desire hereafter to change the place of diversion or water provided to be diverted for MUNICIPAL AND DOMESTIC USES by means of the Highland Ditch, it may make such change in the place of diversion; provided, however, that such changed place of diversion will not create a condition which will be detrimental to any of the rights of the other parties hereto under this agreement.

(D) Wherever the words "flow" or "rate of flow" are used in this agreement and the amount thereof is stated in cubic feet per second, such words shall mean rates of flow during each day equivalent to a constant and uniform flow at the rate stated.

(E) For the purpose of this agreement a depth of one foot in Lake Tahoe shall be assumed to have a capacity of 120,000 acre feet.

(F) For the purpose of this agreement, all elevations herein mentioned shall be determined by reference to that certain bench mark identified in the 1915 DECREE as the top surface of a hexagonal brass bolt ⅞" in diameter projecting 1" from the vertical face of the left hand or Southerly concrete abutment wall of the present existing Lake Tahoe dam, at approximately 3.2 feet below the top thereof and approximately in line, both horizontally and vertically, with the upstream ends or "cutwaters" of the concrete piers between the sluiceways of said dam, which said bench mark shall be conclusively presumed to be 6230.00 feet above sea level.

(G) From and after the OPERATIVE DATE OF THIS AGREEMENT, all of the parties hereto agree as follows:

(1) That the natural conditions obtaining on said date in the bed and banks of Lake Tahoe and of the Truckee River at and in the vicinity of the outlet of Lake Tahoe, above the dam that is at or near the point where said Lake empties into the Truckee River near Tahoe City, Placer County, California, shall not be disturbed or altered by any of the parties hereto without the approval of the Attorney General of the State of California; provided, however, that in the event that said conditions existing on said date shall alter or change for any cause or reason, then the parties hereto respectively shall have the right to restore said conditions; (2) that they will not create nor cause to be created any outlet of said Lake in addition to the present natural outlet thereof; and (3) that they will not remove water from Lake Tahoe for irrigation or power uses by any means other than gravity, except upon the condition that the Secretary of the Interior of the United States shall have first declared the same a necessity, and that they will not remove water from Lake Tahoe for sanitary or domestic uses by any means other than gravity, except upon condition that the Departments of Health of the States of Nevada and California, or other officers exercising similar authority, shall first have made and filed with the Attorney General of the State of Nevada and the Attorney General of the State of California certificates showing that a necessity for the same exists.

ARTICLE XXVI. Execution of agreement in counterparts, etc.

This agreement and/or the stipulation referred to in Article I hereof may be executed in any number of counterparts, each of which shall for all purposes be decreed to be

the original; and such counterparts singly or together shall constitute one and the same instrument. The Conservation District, the Irrigation District and the Power Company shall be entitled to affix to any duplicate executed copy or copies of said agreement the signature affixed to such counterparts, in order to facilitate the recordation thereof.

Any user of the waters of the Truckee River and/or its tributaries within the Conservation District, who shall not have become a party to this agreement by signing his name hereto prior to the OPERATIVE DATE OF THIS AGREEMENT, may nevertheless become a party hereto and be entitled to the benefits hereof by thereafter signing this agreement, provided the Conservation District shall consent thereto.

ARTICLE XXVII. Irrigation District contract authorized by election and confirmed by Court.

The execution of this contract shall be authorized by the qualified electors of the Irrigation District and Conservation District at elections held for that purpose. Thereafter without delay the two districts shall prosecute to decree proceedings in court for a judicial confirmation of the authorization of this contract. The United States shall not be bound in any way to proceed under the terms of this contract unless and until confirmatory final judgments of such proceeding shall have been rendered, including a final decision in any appeal presented therefrom. The two districts shall without delay furnish the United States for its files certified copies of all proceedings relating to the elections upon this contract and the confirmation proceedings in connection therewith.

ARTICLE XXVIII. Member of Congress Clause.

No member of or delegate to Congress or resident commissioner shall be admitted to any share or part of this contract or to any benefit that may arise therefrom. Nothing herein contained shall be construed to extend to this contract if made with a corporation for its general benefit.

IN WITNESS WHEREOF; the parties hereto have executed this agreement, the day and year first above written.

UNITED STATES OF AMERICA,

By .....

Party of the First Part.

TRUCKEE-CARSON IRRIGATION DISTRICT,

By .....

By .....

Party of the Second Part.

WASHOE COUNTY WATER CONSERVATION DISTRICT,

By .....

By .....

Party of the Third Part.

SIERRA PACIFIC POWER COMPANY,

By .....

By .....

Party of the Fourth Part.

EXHIBIT A.

In the District Court
of the United States
in and for
the District of Nevada

In Equity,
Docket No. A3

The United States of America,
Plaintiff,

vs.

Orr Water Ditch Company, et al.,
Defendants.

STIPULATIONS FOR ENTRY OF FINAL DECREE

WHEREAS the above entitled Court, after a full hearing of the parties, heretofore made and caused to be entered herein a temporary restraining order dated February 13, 1926, defining the rights of the parties to said cause in and to the waters of the Truckee River and restraining said parties from diverting or using water of said River except as therein provided, which order is now in force and is hereby referred to and made a part hereof;

AND WHEREAS, for the purpose of conserving the waters of Lake Tahoe and the Truckee River and its tributaries and for other purposes, the United States of America, Truckee-Carson Irrigation District, Washoe County Water Conservation District, Sierra Pacific Power Company and various other users of the waters of the Truckee

River have entered into, or are about to enter into, an agreement (hereinafter referred to as the "Truckee River Agreement"), a copy of which agreement is annexed hereto and made a part hereof;

AND WHEREAS said Truckee River Agreement provides that a final decree shall be entered herein as provided in this stipulation,—

NOW, THEREFORE, in consideration of the execution of this stipulation by the undersigned, and of the mutual promises of the parties herein contained, IT IS HEREBY STIPULATED by and between the undersigned parties to said cause as follows:

1. That a final decree in substantially the form of the form of final decree annexed hereto and marked "Exhibit 1" and made a part hereof, may be entered herein.

2. That if said Court shall decline to enter final judgment herein in the form of the decree attached hereto and marked "Exhibit 1", and shall direct that in the entry of said decree any change shall be made in the provisions of said decree directly affecting the rights of any signer of this stipulation, then and in that event such change shall be forthwith submitted to the party or parties directly affected thereby, and if such party or parties, together with the United States of America, the Truckee-Carson Irrigation District, the Washoe County Water Conservation District and the Sierra Pacific Power Company shall approve such change a supplemental stipulation amending said original stipulation and signed by the United States, the Truckee-Carson Irrigation District, the Washoe County Water Conservation District and the Sierra Pacific Power

Company and by such other party or parties hereto who shall be directly affected by such change shall be filed with said Court.

3. In view of the fact that this stipulation is the basis of other action being taken by certain of the parties to said Truckee River Agreement as therein provided, It is understood and agreed that no signer of this stipulation shall withdraw his signature thereto, and the execution of this stipulation shall be irrevocable.

4. This stipulation shall not be effective for any purpose unless and until the same shall have been filed in said Court as provided in said Truckee River Agreement, but upon being so filed the same shall be effective in accordance with its terms.

Dated: ....., 1935.

EXHIBIT B.

....., 1935

First National Bank in Reno,
Reno, Nevada.

Dear Sirs:

The undersigned hand you herewith:

(A) Stipulation for the entry of a final decree in the cause pending in the United States District Court for the District of Nevada entitled "The United States of America, plaintiff, v. Orr Water Ditch Company, et al, defendants", and numbered, In Equity No. A-3 in the records of said Court (which cause is herein referred to as the "Truckee River Adjudication Suit");

(B) Two duplicate executed copies of agreement dated ....., 1935, between United States of America, party of the first part, Truckee-Carson Irrigation District, party of the second part, Washoe County Water Conservation District, party of the third part, Sierra Pacific Power Company, party of the fourth part, and certain other users of the waters of the Truckee River and/or its tributaries, parties of the fifth part (said agreement being hereinafter referred to as the "Truckee River Agreement").

You are hereby instructed as follows:

1. To retain in your possession said stipulation and duplicate agreements until the following additional documents or certified copies thereof, shall have been filed with you (provided that the same shall be filed with you on or

prior to March 1, 1936 or within any extension of said date), to-wit:

(a) Notice or certificate of the Secretary of the Interior of the United States stating that SUPPLEMENTAL RESERVOIR described in Paragraph (B) of Article II of said Truckee River Agreement is available for the storage of water;

(b) Final permit of the Department of Public Works of the State of California (or other officer, bureau or commission of said State exercising functions similar to those exercised by said Department) approving the construction of the dam of the Conservation District at said SUPPLEMENTAL RESERVOIR (if such permit be required by law);

(c) Certificate of the Department of Public Works, or the State Engineer of the State of California, or the State Engineer of the State of Nevada, or of the Chief Engineer of the Bureau of Reclamation of the United States (or other officer, bureau or commission exercising functions similar to those exercised by said Department or said Engineers respectively) showing that said SUPPLEMENTAL RESERVOIR has been completed and has the capacity and conforms to the other conditions relating thereto specified by Paragraph (B) of Article II of said Truckee River Agreement;

(d) Final Permit of the Department of Public Works of the State of California (or other officer, bureau, or commission of said state exercising functions similar to those exercised by said Department) approving the construction of the dam at the PONDAGE reservoir of the Power Com-

pany described in Paragraph (A) of Article II of said Truckee River Agreement (if such permit be required by law); and

(e) Certificate of the Department of Public Works or the State Engineer of the State of California, or the State Engineer of the State of Nevada, or the Chief Engineer of the Bureau of Reclamation of the United States (or other officer, bureau or commission exercising functions similar to those exercised by said department or said Engineers, respectively) showing that PONDAGE has been completed in accordance with the conditions relating thereto specified in Paragraph (A) of Article II of said Truckee River Agreement.

2. If and when all of said documents specified in paragraph (1) hereof have been filed with you prior to March 1, 1936 (or such later date to which the time for filing the case may be extended you shall:

(a) deliver one duplicate executed copy of said Truckee River Agreement to the County Recorder of the County of Washoe, State of Nevada, for recordation, and

(b) deliver to and file with the Clerk of the United States District Court for the District of Nevada in said Truckee River Adjudication Suit the remaining executed copy of said Truckee River Agrement, together with said stipulation and said documents referred to in subparagraphs (a), (b), (c), (d) and (e) hereof.

3. If said documents refered to in said subparagraphs (a), (b), (c), (d) and (e) of Paragraph 1 hereof shall not be filed with you within the time hereinabove specified (or any extension thereof), you shall promptly return to the

undersigned Truckee-Carson Irrigation District, Washoe County Water Conservation District and Sierra Pacific Power Company all of the documents hereinabove referred to. A receipt for said papers signed by the attorneys for said Truckee-Carson Irrigation District, Washoe County Water Conservation District and Sierra Pacific Power Company shall constitute a sufficient acquittance to you therefor.

You may accept a written opinion signed by the attorneys for Washoe County Water Conservation District, Truckee-Carson Irrigation District and Sierra Pacific Power Company as conclusive evidence that the time for the filing with you of any said documents referred to in said subparagraphs (a), (b), (c), (d) and (e) has or has not been extended, and if so, as to the date to which the same has been extended and also as to whether or not any of said notices, permits or certificates referred to in subparagraphs (b) and (d) are required by law, and also as to whether any of the foregoing notices, permits and certificates, are, or are not, in due form and properly executed, or as to any other matter arising under, these escrow instructions.

Yours very truly,

TRUCKEE-CARSON
IRRIGATION DISTRICT,

By .....

By .....

WASHOE COUNTY WATER
CONSERVATION DISTRICT,

By .....

By .....

SIERRA PACIFIC POWER COMPANY,

By .....

By .....

By .....

By .....

Appendix H

In the District Court
of the United States
in and for
The District of Nevada

In Equity, Docket No. A3

The United States of America
Plaintiff

vs.

Orr Water Ditch Company, et al.
Defendants

FINAL DECREE

In the District Court of the United States
in and for the District of Nevada
In Equity, Docket No. A3
The United States of America, Plaintiff

vs.

(A) Daisy Adams, successor to George Imes and Andrew Drake (435); Henry Brewster Adams and Edna R. Adams (380), Aguerrebere and Marinelarina, successors to Coopers (66) E. R. Albee and Leora Albee, successors to William Pierson (638); A. E. Albers (163), Mrs. P. J. Allen (562), W. O. Allen or successors, successors to J. W. Coulter (456); A. A. Almgren (572), H. F. Alps (367), James Alt and Susan Alt Estate, succeeded by Charles W.

Mapes (601) C. J. Anderson, successor to Mary De Remer (445); Henry Anderson (335-336), Anderson and Lee, executors, P. S. Jensen Estate (375); Venanzio D. Andrea and Attilo Deini, successors to J. B. McCullough (345); Louis Anelli, intervenor (135); John Aratzabel, successor to F. M. Rowland (298); Eugenio Arbico, successor to Maude Menardi (501); Mrs. Louise Arden (63), James Atcheson and L. R. McKenzie, successors to A. L. Laughton, intervenor, and to George Christensen (48); G. B. Avansino (184, 214), G. B. Avansino (270, 368); John Avansino, succeeded by L. M. Christensen (587, 608); Lazzaro Avansino (143), Louis Avansino, succeeded by Pasquale Capurro (466) and Peter Finn and co-owners (468); Luigi Avansino, succeeded by R. T. Jenkins (238); P. G. Avansino, successor to S. Martinengo (413); F. V. Avilla, intervenor, successor to J. L. Wollam (119); Antonio Azaveda, succeeded by George Grose (327-328);

(B) Ella M. Bailey, formerly Ella M. Smith, and Viola M. Sauer—(655-656-657-658-659-675); H. H. Bailey, successor to Mrs. Kate Brackin (418); Issac N. Bakeless (209-210), Henry B. Baker (86), Angelo Balsi (211-212), Bank of Nevada Saving and Trust Company, incorporated, H. A. Banta, successor to L. M. Christensen (513); Ben Barbash and Louis Cohn, successors to J. J. Lyons (593); G. C. Barber (156½); Alessandro Baroli (178½-205) successor to Mary De Remer (256); Mrs. G. A. Bartlett (451), J. J. Barton, succeeded by Joe Ryans and E. Hawkins (154); Vic Basso, intervenor (134); Mrs. Anna Bates (412-505); Julien Bazin (279), Mrs. C. Berg (36), D. Bergerin (34), Mary G. Bellamy, succeeded by A. H. Ramelli (294); Brune Bernard, succeeded by A. Bonamici, G. Sorani and S.

Sorani (581); Jean or John Bernard (420), Louis W. Berrum (145-177-178-204-260), succeeded by Carl Elges (173); Walter Berry, succeeded by Giulio Quilici, Ernesto Giannattei and Narciso Matteoni (470-471); H. Bersani, intervenor (83) and successor to Garavanti and Pessi (84); Angela Besso, Carrie Besso, Emery Besso and Frank Besso, intervenors, successors to Augustino Besso (111-112-194); Joseph Bianchini (570), E. L. Bickford, succeeded by Mrs. Ed. Harvey (540); George R. Bidleman, succeeded by Pete Laiolo, William Capurro and Louis Capurro (472-473); Nick Bisagno (315), J. T. Bisagno, Ferdinand Bisagno and T. J. Bisagno, successors to William H. Frazer (319); F. D. Black, successor to J. P. Kane (437); J. M. Blood (285); George Blundell (354-355), T. H. Blundell, succeeded by J. P. Reynolds (630); T. H. Blundell, successor to E. J. Posvar (637); Mrs. O. J. Boies, succeeded by E. C. Kylander (539); Andy Bonamici and G. Sorani and S. Sorani, successors to O. C. Ross (581); Antone Borsi and Steve Borsi, successors to E. A. Brainard, F. Roberti and C. T. Mullins (53); Mrs. C. E. Boswell, successor to J. Duncan (564), Giovanni Bottini (520), Mrs. Bessie Bovee, succeeded by J. H. Schroeder (492); Myrtle B. Boynton, Alice Boynton, John W. Boynton, Jr., Clinthy C. Boynton, or successors, (476 to 479); Mrs. Kate Brackin, succeeded by H. H. Bailey (418); Jeanette Bradley (266-479), Celia Bradshaw (275), E. A. Brainard, succeeded by Steve Borsi and Antone Borsi (53); E. A. Brainard, succeeded by M. C. Galvin and J. Galvin (323); R. N. Brannin, succeeded by C. L. Steiner (557); T. M. Branton (699); Mary Brewington, formerly Mary De Remer (439); Trannie Bridgeman (223), Louis Britshgi (351-352-353); Charles

W. Brooks and Alfred Peckham, successors to Christopher J. Finn and Peter Finn (474-475); Adna Brown, Albert Brown, Mrs. Elizabeth Brown and Laura Brown (715); Jessie Bryan, John S. Bryan, successors to H. F. Alps (366); J. Burke and P. Burke, succeeded by Felix Turrillas and Amado Yriarte (288); A. A. Burke and F. D. Burke (493), Jeanette Burke and James Burke, succeeded by Holcomb Brothers (706).

(C) John Cadlini and Joe Cadlini (631), Cafferata and Pearson (244½), Mrs. Ed. Calhoun, successor to Irene Poole and James Poole (551); Mrs. Annie Callahan, Mary Ann Callahan (650-651); James Callahan (648'9) and as successor to Degiovanni Brothers, intervenors, (78-188); Phillip Callahan (647-'7½); George H. Calligan, successor to William Neasham (568); Mrs. William Calligan, succeeded by A. Van Derhoof (536); Ernesto Canepa intervenor, successor to A. Chinsini and R. W. Parry (51-101); A. C. , successor to Warren G. Rice (594); Angelo Capurro, succeeded by L. A. L. Green (661-673-674); Bartolome Capurro, successor to G. B. Questa (405-406); B. Capurro and John Capurro or Gustino Capurro (52-108-146-192-52½-727-727½); Joe Capurro, successor to Steve Cappurro, intervenor (136); Louis Capurro and William Capurro, successors to George R. Bidlemen (472); Pasquale Capurro (459); Pasquale Capurro, successor to Louis Avansino (466); S. Capurro, (171-172); Stefano Capurro and David Gardella, successors to D. Zolezzi (736); Stephano Capurro, succeeded by L. F. Johnson (50-97); Steve Cappurro, intervenor, succeeded by Joe Capurro (136); William Capurro, successor to George R. Bidleman (472); Samuel Caramella (465), G. Cardona (504), Joe

Carmella, successor to Nevada United Mines Company, a corporation (324); Matie D. Carter, succeeded by D. C. Wheeler, Inc., (182-207); Mary Casazza, Joseph Casazza, and Toni Casazza, successors to Paulo Casazza, Joe Casazza, David Casazza and Toni Casazza (76-187-718); G. Casci (582-619); Pietro Casinelli (391-392-393-403); P. Casinelli, successor to John Gotalli (583); Casquet (37); Charles E. Catoir and Joe P. Strathman, successors to S. J. Prose (397); Mrs. Crissie A. Caughlin (150-150½-230-726½), Central Pacific Railway Company, succeeded by Southern Pacific Company, (526-527); D. Ceresola (642), Estate of Louis M. Ceresola, J. A. Ceresola, W. J. Ceresola, successors to E. Olinghouse (639-640-643-645); G. Ceresola, successor to George Gould, (534); A. Cerfoglio, successor to C. F. Cooper (183-213); D. Cerfoglio and P. Cerfoglio, successors to Mrs. B. Ghiggeri or Madeline Ghiggeri (70); L. Cerveri and G. Cerveri, intervenors (89); A. E. Cesmatt (161), Moses Chase (284), A. Chinsini, succeeded by Ernesto Canepa (51-101); Mrs. Alice Chism (271-369-370), C. J. Christensen, successor to Stewart McKay (610); George Christensen, succeeded by Atcheson and McKenzie, successors to A. L. Laughton, intervenor (48); George Christensen (166); J. H. Christensen or successor to Mary J. Howard (717); L. M. Christensen, successor to John Avansino (587-608); L. M. Christensen (494-495), L. M. Christensen, succeeded by H. A. Banta (513) and by A. L. Jensen (512); Nels Block Christensen (330-569), J. E. Church; Dale B. Clanton (423), A. J. Clark, succeeded by Nora Clark (269-364); A. J. Clark, succeeded by Humphrey Supply Company (533); Estate of Samuel Clark (290), Theodore W. Clark (578), Grace Clow (124), G. N. Clute,

succeeded by P. S. Jensen (349); Louis Cohn, successor to J. J. Lyons (593); Mrs. F. T. Cole, succeeded by Otto Holz (559); L. A. Cole, successor to G. R. Duncan (422); Comer, succeeded by F. C. Smith (565); Commercial Soap Company (243½); Frank Compston and Charlotte Compston, successors to Tony S. Faretto and wife, Catherine Faretto (179½-206-259); Estate of B. A. Cooper, Sophia Cooper, Charles F. Cooper, Myrtle A. Cooper, Urban A. Cooper and Hazel B. Cooper, succeeded by Aguerrebere and Marinelarina (66); Charles F. Cooper, succeeded by A. Cerfoglio (183-213), C. M. Copelin, successor to Mrs. P. E. Fulwider and J. F. Williams (545); W. H. Corbiere, succeeded by H. S. Teasdale (556); J. W. Coulter, succeeded by W. O. Allen (456); L. E. Cox and wife, Nancy J. Cox and C. L. Cox (515); Mrs. M. N. Cox (176), R. J. Crawford (276), George T. Crosby (503), Alex Crotta, successor to Lucy M. Ulyatt (576); C. E. Crouch, succeeded by Mrs. Otto Holz (560); Mrs. Mamie Crowell, succeeded by Charles , and A. Landa (67); B. Curano, succesor to Mary De Remer ; James Curnow, succeeded by Natale Denivi (528) and Mary Sorani and Plenio Sorani (529); Laura B. Curnow, successor to Mrs. William Curnow (531).

(D) Alice Davis, succeeded by W. H. Davis (561); W. H. Davis (566), Rick De Bernardi (55-151-196), Rick De Bernardi, successor to Lena Robertina (56); Decosse (25), Degiovanni Brothers, intervenors, succeeded by J. Geravanta (82); Degiovanni Brothers, intervenors, succeeded by James Callahan '8-188); Degman and Richardson, succeeded by Carl Elges (64); Attilo Deini and Venanzio D. Andrea, successors to J. B. McCullough (345); Natale Denivi, successor to James Curnow and Antone Figone (528);

G. S. Denton, succeeded by Peter Quillici (17); Domenico Depaoli (586); M. P. Depaoli, successor to John B. Sturla and Frank Monte (641); M. P. Depaoli, successor to E. Olinghouse (639-640-643-645); Mary De Remer, now Mary Brewington; Mary De Remer, succeeded by B. Curano (254), Mrs. L. V. Herman (255), A. Baroli (256), Angelina Gaspari (350), J. A. Scanavino (440), J. W. Jones (441), H. E. Snare (442), D. P. Jones (443), E. L. Hall (444), and C. J. Anderson (445); D. Devincenzi (413½); Mrs. Mary Dickey and Mary V. Dickey, succeeded by Charles W. Mapes (601); C. D. Dixon, succeeded by M. Pradere (340); Johnson Dixson (22); Andrew Drake, succeeded by Daisy Adams (435); Mrs. F. A. Drake, successor to R. N. Drake (308-408½); Mrs. E. A. Drolette, successor to S. M. Tallman (169); C. H. Duborg (277); J. Duncan, succeeded by Mrs C. E. Boswell (564); G. R. Duncan, succeeded by L. A. Cole (422); F. E. Durham (94); J. H. Dwyer (424).

(E) Marion L. Eaton (237); W. T. Echols, succeeded by C. P. Ferrel (305-407½); J. W. Eckley, administrator, succeeded by Carl J. Lockwood (623); Eddystone Farm and Produce Company, succeeded by Mark L. Yori (302-303); Stephen Ede and Phillip Ede, succeeded by Peter Thomsen (215-216-217); Albert W. Edwards; Electric Mining and Reduction Company, incorporated (12); Carl Elges (316); Carl Elges, successor to Degman and Richardson (64) and L. W. Berrum (173); Miss Estey (27); Alvira Evans (133); Elizabeth Evans, succeeded by C. Gadda and W. F. Gadda (283); Elizabeth Evans, succeeded by J. N. Evans Estate Company, incorporated, (130-280-383-616-618).

(F) C. J. Fairchild (620); Antonio Faretto and Louis S. Faretto (506-507); Charles A. Faretto, Katherine Faretto, M. D. Faretto, successors to Joe Faretto Estate, succeeded by Charles Faretto and A. Landa (67); Federal Trust Company, succeeded by Julius Pieh (253); Domengo Felipelli (79-189-720½); G. Felipelli, succeeded by Gerolemo Zolezzi, intervenor (86); Nick Felipelli (224-225); D. Ferrari and Caterina Ferrari (598), succeeded by Pasquale Istrice (599); Angelo Faretto, John Faretto and Joseph Faretto (75-219-220); Estate of D. Ferretto (662-676-677-678-679); John G. Ferretto and Peter W. Ferretto (663-684-685-686); T. S. Ferretto, succeeded by Frank Compston and Charlotte Compston (179½-206-259); C. P. Ferrell, successor to Carlo Rosasco and W. T. Echols (305-407½); G. L. Ferris and Mrs. L. Ferris, successors to Edwin Ferris (152-197-231-356); Mrs. G. R. Fettic, succeeded by A. H. Ramelli (294); Antonio Figone, succeeded by Natale Denivi (528) and Mary and Plenio Sorani (529); Mary S. Finley (29); Peter Finn and Co-owners, successors to Louis Avansino (467); Christopher J. Finn and Peter Finn, succeeded by Peckham and Brooks (474); E. Fiori (427); Flanagan Addition or J. N. Evans Estate Company, incorporated (130); Patrick L. Flanigan; H. Fleishacker and Scheeline Estate (588); Mrs. Alice Foley (59); C. D. Folsom (282); Ed Foreson (200-233); W. H. Frazer (319); W. H. Frazer, succeeded by J. T. Bisagno, Ferdinand Bisagno and T. J. Bisagno (322); Leo E. and Frances A. Frey, successors to Louise Frey (179-257—) Mrs. Harry Frey, succeeded by Aguerrebere and Marinelarina (66); Clyde Frohlich, Hilda Frohlich and Willie Frohlich (509-517); W. F. Fugate (421); J. M. Fulton, Theodora Fulton

and C. L. Taylor and grantees (398-399); Mrs. P. E. Fulwider, succeeded by C. M. Copelin (545); Mrs. P. E. Fulwider (544).

(G) C. Gadda and W. F. Gadda, successors to Elizabeth Evans (283); Galena (38); Frank J. Gallery, intervenor, successor to C. G. Knox (116-117); C. W. Galloway (160); J. C. Games (246); Mrs. E. C. Galsgie, successor to Fannie T. Haynes (446); M. C. Galvin and J. Galvin, successors to E. A. Brainard (323); Garavanta Land and Livestock Company, incorporated, successor to John Garavanta (635-636); Garavanta and Pessi, succeeded by H. Bersani, intervenor (83); Luigi Garaventa, succeeded by Quilici and Panelli (625); David Gardella and Stefano Capurro, successors to D. Zolezzi (736); Felice Gardella (613); Joseph Gardella (644); L. Gardella, intervenor, succeeded by L. F. Johnson (50-97); Paul Garson, intervenor, successor to Chris Theusen (46); Angelina Gasparri, successor to Mary De Remer (350); C. J. Gault, succeeded by Otto Olsen (326); Dan Gault and James Gault (313-314); Eli Gauthier and P. Leauthier, successors to Minnie E. Ward (417); Domingo Gavica (19); C. A. Gelmstedt (199-232); Martin Geraghty, successor to Peter Murphy (622); Pearl A. Gerard, succeeded by Fritz Niebuhr (590); S. Geravanta (81); S. Geravanta, successor to Degiovanni Brothers, intervenors (82); Andrew and Julia Ghiggeri, succeeded by J. B. Pecetti, intervenor (73); Madalina Ghiggeri and Bart Ghigleri, succeeded by D. and P. Cerfoglio (70); Annie Ghigleri, Andrew Ghigleri and John Ghigleri, for Andrew Ghiggeri, succeeded by E. D. Maddalina (185); B. Ghiggeri, successor to A. Litch Estate (240); Andrew Ghigleri and Peter Ghigleri, successors to John F. Kleppe

(600); Ernesto Giannattei, or successors to Walter Berry (470-471); J. W. Gilpin, succeeded by Mrs. Fred Jones (541); G. Ginocchio, successor to Mrs. Clara Streiff (429); G. B. Ginnochio, succeeded by Blanche Mae Belle Vanderwerker (382½); Nick Ginnocchio (80-190); Giovannia and Felipelli, succeeded by Gerolemo Zolezzi (86); H. L. Gleason, successor to A. C. Armstrong (174); Glendale Irrigating Ditch Company, incorporated, (612) Betty Glenn, succeeded by Aguerrebere and Marinelarina (66); F. W. Glenn, succeeded by Dondero (62); John Gotalli, succeeded by Casinelli and Silvey (583); George Gould, succeeded by Humphrey Supply Company, incorporated, (533); and by G. Ceresola (535); Will E. Gould (500); E. B. Graves, succeeded by A. Van Derhoof (536); P. S. Greeley and Mrs. C. Mitchell (552); L. A. L. Green, successor to Vanetti and Capurro (661-673-674); John Gregorich, successor to John S. Sheehan (553); Della Grignon (40); George Grose successor to Antonio Azaveda (327-328); James Grose (329); Ralph M. Guthrie (461);

(H) E. L. Hall, successor to Mary De Remer (444); Hans Hanson, intervenor (49); Mrs. Mette Hanson, succeeded by Henry S. Hanson and Martha W. Landis (180); J. L. Hash (207½-265½); U. S. Hanson (681-682-683); J. E. Harris, succeeded by Robert Nelson (61); W. J. Harris (271½); Mrs. Ed. Harvey, successor to E. L. Bickford (540); E. Hawkins and Joe Ryans, successors to J. J. Barton (154); P. A. Hawkins (373); Archie E. Haydon, succeeded by I. M. Lewis (343); Mrs. E. A. Haydon, succeeded by Mrs. A. Trosi (346); Fannie T. Haynes, succeeded by Mrs. E. C. Galsgie (446); Mrs. L. V. Herman, successor to Mary De Remer (255); E. S. Heward, successor to R.

W. Williams (389); Albert A. Hibbard; J. M. Higgins (411); Thomas Hill, succeeded by John P. Williams (628-629); Himmelberger, succeeded by W. H. Jones (157); Helena E. Hogan (102-142); Hogan and Muran (508); Holcomb Brothers, successors to Jeanette and James Burke (669-706) and Nick Sorgi (669-702-703-704-705-706); G. R. Holcomb Estate Company, incorporated, (74-144-191-218-670-707-708-719-720-728 to 732); George E. Holesworth, succeeded by Charles W. Mapes (510-514); C. C. Hollenbeck (615); Hugh Holstrum (21-see 724b.c.); Otto Holz, successor to Mrs. F. T. Cole (559); Mrs. Otto Holz, successor to G. C. Strader and C. E. Crouch (560); Ben Howard or Estate of or successors to Mary J. Howard (716); Mary J. Howard, or successors or J. H. Christensen (717); H. G. Hubbard (165); H. G. Humphrey (457); H. G. Humphrey, successor to Margaret Schaffer Estate (408); H. G. Humphrey, successor to William H. Winfrey and Edwin E. Winfrey (409); Humphrey Supply Company, incorporated (296-611); Humphrey Supply Company, incorporated, successor to Mary J. Kinney (579-580); Humphrey Supply Company, incorporated, successor to George Gould (532-533); Frances Hunken, successor to H. C. Hunken (91); Hunter Creek Water Company, incorporated, succeeded by Truckee River Power Company, incorporated (725-726).

(I) George Imes, succeeded by Daisy Adams (435); Martin Inda and Romaldo Irrabarren, successors to George A. Percival (597); Indian Colony, by U. S. Indian Service, successor to Ione Gould Lewis (499); Indian Lands, Pyramid Lake Reservation, by United States (1-2); George W. Ingalls and Eliza Ingalls, succeeded by August

Salet (396); Romaldo Irrabarren and Martin Inda (597); Pasquale Istrice, successor to D. Ferrari and Caterina Ferrari (599); Italian Beneficial Society, succeeded by B. Curano (254).

(J) B. A. Jacobi (434); Chris Jacobsen, successor to J. C. Murry and wife, Agnes Murry (595); M. Jepsen and M. Jacobsen, succeeded by James Nelson (318); Anna James (286); R. O. James (241½); R. T. Jenkins, successor to Luigi Avansino (238); Anna Jensen, successor to J. R. Tarner (547); A. L. Jensen, successor to L. M. Christensen (76-78); J. Jensen (32); Martin Jensen, successor to Grant E. Rice (591); P. S. Jensen, successor to G. N. Clute (349); P. S. Jensen Estate (375); Robert Jensen, succeeded by Kathryn N. Ray (496); R. C. Jensen, succeeded by Louis M. Nelson, intervenor (118); R. C. Jensen, intervenor, successor to Reno Power, Light and Water Company, incorporated, and to J. Pincolini (132); M. Jepsen and M. Jacobsen, succeeded by James Nelson (318); James Jepson (538); James Jepson, succeeded by J. M. Wyckoff (537); John Johnson (287); John Johnson, successor to John W. McCollum (304); Leonidas Frederick Johnson, successor to Stefano Capurro and to L. Gardella, intervenor, (50-97); Mahalia E. Johnson (431-432-433); Charles Jones and Jane Jones (605-606-607); D. P. Jones, successor to Mary De Remer (443); Mrs. Fred Jones, successor to J. W. Gilpin (542); John Jones (30); J. W. Jones, successor to Mary De Remer (441); W. H. Jones, successor to Himmelberger (157).

(K) Sarah Kahn, succeeded by Charles W. Mapes (601); J. P. Kane, succeeded by F. D. Black (437); Pat-

rick J. Kelley, succeeded by Mark L. Yori (302-303); William F. Kestell (460); A. E. Kibble, lessee Mrs. L. Simas, intervenor (110); Albert Kietzke (414-415-416); Mary H. Kinney, succeeded by Humphrey Supply Company, incorporated, (579-580); John F. Kleppe (617); John F. Kleppe, succeeded by Andrew and Peter Ghigleri (600); C. G. Knox, succeeded by Frank J. Gallery (116-117); F. M. Konkel and B. L. Konkel, successors to C. A. Swart (558); J. H. Kormier, successor to N. J. Ploder (554); A. R. Kosswig, succeeded by Mrs. John Schwandt (567); N. B. Kyker, successor to Mrs. S. M. Stephens (550); E. C. Kylander, successor to Mrs. O. J. Boies (539);

(L) A. T. Laffranchini, succeeded by Toni Saralagui or Antonio Savellegin (239); G. Laiolo (168); P. Laiolo, successor to George W. Bidleman (472); M. A. Laking (548); W. E. Lampson and F. C. Savage, succeeded by Dr. F. H. Phillips (247); W. E. Lampson and F. C. Savage, succeeded by W. E. Lampson (248); Mrs. E. J. Lanagan (419); A. Landa and Charles Faretto, successors to Joe Faretto Estate (67); Martha W. Landis and Henry S. Hanson, successors to Mrs. Mette Hanson (180-723½); Mrs. A. H. Lane (274); L. M. Largomarsino, succeeded by Carl J. Lockwood (621-623); Thomas Largomarsino, executor, succeeded by Carl J. Lockwood (621-623); A. L. Laughton, intervenor succeeded by J. Atcheson and L. R. McKenzie (48); Charles Laughton, successor to George and Ella Laughton (394); Frank A. Laughton, intervenor, (104); Nancy J. Laughton, succeeded by Abbie W. Quinn, intervenor (103); T. B. Laurie, succeeded by H. G. Hubbard (165); Robert Lovoie (164); G. Lavagnino and C. Lavagnino (325); Peter Lawless succeeded by Constantino and

Bruno Petri (624); Peter Leauthier and Eli Gauthier, successors to Minnie E. Ward (417); Frank M. Lee, or successors (376); Leete Syndicate (278); Ione Gould Lewis (498); Ione Gould Lewis, succeeded by the United States (499); I. M. Lewis (342-344); I. M. Lewis, successor to Archie E. Haydon (343); A. Litch Estate, succeeded by B. Ghiggeri (240); Carl J. Lockwood, successor to L. M. Largomarsino and to R. Noce Estate (621-623); Guilio Lombardi (71); A. L. Longfield and Trannie Longfield, succeeded by Trannie Bridgeman (223); Mrs. Lonkey, succeeded by Mrs. Sorenson (41); Guiseppe Luchetti and Gia Batta Luchetti (571); W. P. Lyell, succeeded by D. W. Ridenour (226-227); John J. Lyons, succeeded by Ben Barbash and Lou Cohn (593); James S. Lyons (668-700 to 701); James S. Lyons, successor to Nick Sorgi (646):

(M) Charles E. Mack (372); Charles E. Mack and W. L. Semenza (—); E. D. Maddalena, successor to Andrew Ghiggeri (185); G. D. Maddalena, intervenor, successor to A. F. and Margaret A. Swall (72-186); Charles Maggiolo, succeeded by Matteo Ramelli (388); C. Maggiolo, successor to Ben Raggio (300); Mat Magzan, or Matt Mazzaro (162); George W. Mapes, succeeded by Charles W. Mapes (602); George W. Mapes, succeeded by Martino Marchi (234); George W. Mapes, succeeded by Charles T. Sorgi (362); George W. Mapes, succeeded by H. D. Sanborn (235); George W. Mapes, succeeded by N. L. Neilson (363); Charles W. Mapes, successor to George W. Mapes (602); Charles W. Mapes, successor to Alt Estate (601); Charles W. Mapes, successor to George Holesworth (510-514); Emma J. Marble, formerly Emma J. Williams, now Emma J. or Mrs. George R. Bidleman (485-486-487-488-489); Gio-

vanni Marchi (58); Martino Marchi, successor to George W. Mapes (234); Marinelarina and Aguerrebere, successors to B. A. Cooper Estate (66); Frank Marks (13-30); S. Martinengo, succeeded by P. G. Avansino (413); Frank P. Martin, succeeded by B. Pacini (339); H. C. Masters (175); (Mason's Cemetery-see Trustees); John M. Matley and wife, Annie M. Matley, successors to Martha Steinberger (519-522); John M. Matley and wife, Annie M. Matley, successors to Minnie E. Ward (518-523); Narciso Matteoni, of successors to Walter Berry (470-471); H. Maxson (402) and H. B. Maxson (401); Agatha Maxwell and William Maxwell (516); Matt Mazzaro or Matt Magzan (162); Patrick McCarran (626-627); Henry S. McLeod and wife, Lillian M. McLeod, successors to Agnes Nield (155); Sarah McClure (358-359); John McCollum, succeeded by A. H. Ramelli (289); John W. McCollum, succeeded by John Johnson (304); J. B. McCullough, succeeded by Attilo Deini and Venanzio D. Andrea (345); E. McIntosh, successor to A. F. Neidt (122); Stewart McKay, succeeded by C. J. Christensen (610); L. R. McKenzie and J. Atcheson, intervenors, successors to George Christensen and A. L. Laughton (48); Mrs. N. E. McMurdo (321); Albert McPhail; Marino Melillo, successor to J. W. Titus (170); Maude Menardi, succeeded by Eugenio Arbico (501); W. H. Menke (438); Webster Millen (426); C. Mirando, succeeded by Felix Turillas and Amado Yriarte (288); Mrs. C. Mitchell, succeeded by P. S. Greeley (552); Mrs. Phillipine Mitchell (31); Moana Mineral Springs Company, incorporated, (261); William H. Moffat (447); Joe Mongolo (250); Louis Mongolo (584); Frank Monte, succeeded by M. P. Depaoli (641); John Monte (634); Theodore A. Mor-

rill and James Morrill; Chris Mortensen, M. Mortensen, Jr., and Sophus Mortensen, intervenors (47); A. Mosconi, succeeded by Frank Simoni and G. Simoni, intervenors (106-107); C. T. Mullins, succeeded by Steve Borsi and Antone Borsi (53); Peter Murphy, succeeded by Martin Geraghty (622); James Murray and William Murray (358-359); Sam Murray (359-360); Sam Murray, succeeded by H. D. Sanborn (235); John C. Murry and wife, Agnes Murry, succeeded by Chris Jacobsen (595).

(N) T. J. Nash, succeeded by F. C. Smith (565); W. C. Neasham, succeeded by George H. Calligan (568); A. F. Neidt, succeeded by E. McIntosh (122); A. A. Neilson (664-687-688); A. C. Neilson (666-692-693-694-695); H. C. Neilson (667-696 to 697); N. L. Neilson, successor to George W. Mapes (363); Nels P. Neilson; N. T. Neilson succeeded by R. L. Pryor (563); James Nelson, successor to M. Jacobsen and M. Jepsen (317-318); Louis M. Nelson, intervenor, successor to R. C. Jensen (118); Robert Nelson, successor to J. E. Harris and to the Overland Realty Company (60-61); Nevada Gunite Manufacturing and Construction Company, incorporated, succeeded by J. C. Games (246); [(State of Nevada, not a party, rights estimated,—Hospital for Mental Diseases (11-410); University Stock Farm (264); University of Nevada (281); University Experiment Station (384); State Agricultural Society (385)] Nevada Steamboat Springs Company, incorporated (698); Nevada Stock Farm, incorporated, successor to Mrs. Alice Thoma (452); Nevada United Mines Company, incorporation, succeeded by Joe Carmella (324); Francis G. Newlands, James Newlands, Jr., F. G. Newlands Company, incorporated (201); The Newlands Company, incorporated (236-257);

L. C. Nicholas) (39); Fritz Niebuhr, successor to Pearl A. Gerard (590); A. Nield (156); Agnes Nield, succeeded by Henry S. McLeod and wife, Lillian M. McLeod (155); George S. Nixon; Nixon Estate Company, incorporated (—); R. Noce Estate, succeeded by Carl J. Lockwood (621-623); North Truckee Ditch Company, incorporated (525);

(O) Amelia O'Brien (241); J. F. O'Brien (244); J. F. O'Brien, succeeded by D. W. Reilly (245); J. F. O'Brien, succeeded by D. C. Wheeler, Inc. (246); [Odd Fellows Cemetery—see Trustees (120);] E. Olinghouse, succeeded by M. P. Depaoli, W. J. Ceresola, J. A. Ceresola and Estate of Louis M. Ceresola (639-640-643-645); J. D. Oliver (57); Antonio Olivia (293); Otto Olsen, successor to C. J. Gault (326); S. Oppio, successor to Henry Stevens (609); Joe M. Orchio (167); Orr Ditch and Water Company, incorporated, successor to Orr Water Ditch Company (267-320-341); Dennis O'Sullivan, successor to J. D. O'Sullivan (311); J. R. O'Sullivan, successor to J. D. O'Sullivan (312); Overland Realty Company, succeeded by Robert Nelson (61).

(P) B. Pacini, successor to Frank P. Martin (339); Mrs. Page, succeeded by Mrs. Sorenson (41); G. Panelli and R. Quilici, successors to L. Garavanta (625); S. Parlanti, successor to J. E. Petersen (573); R. W. Parry, succeeded by Ernesto Canepa (51); F. G. Patrick (200-242); Angelina Pecetti (691); F. A. Pecetti, successor to John Pecetti (77); John B. Pecetti, intervenor, successor to Andrew Ghiggeri and wife, Julia Ghiggeri (73); Alfred Peckham, James Peckham and George Peckham (464); George E. Peckham (463); Alfred Peckham and Charles W. Brooks, successors to Christopher J. Finn and Peter Finn (474-475).—Peoples Drain Ditch Company incorporated; George A. Percival,

succeeded by Martin Inda and Amaldo Irrabarren (597); Pessi and Garavanta, succeeded by H. Bersani, intervenor (83); Anna M. Petersen (592); J. E. Petersen, succeeded by S. Parlanti (573); R. S. Petersen and wife (310); Constantino Petri and Bruno Petri, successors to Peter Lawless (624); Domingo Pezzi (69); Dr. F. H. Phillips, successor to W. E. Lampson and F. E. Savage (247); George S. Phoenix, succeeded by Mrs. Marie Yori (249); Santino Piazzo, intervenor (138); Lorenzo Picetti, Luigi Picetti and Piero Picetti (68); Julius Pieh, successor to Federal Trust Company (253); Pearson and Cafferata (244½); William Pierson, succeeded by E. R. Albee and Leora Albee (638); A. Pincolini, intervenor (88); Joseph Pincolini, intervenor (137); Joseph Pincolini, succeeded by R. C. Jensen, intervenor, (131-132); Victorio Piretto (149); N. J. Ploder, succeeded by J. H. Kormier (554); E. Plumb Estate (153); R. Plumb Estate (198); Irene Poole and James Poole, succeeded by Mrs. Ed. Calhoun (551); E. J. Posvar, succeeded by T. H. Blundell (637); M. Pradere, successor to C. D. Dixon and M. Yribarren (340); H. J. Pratt, intervenor (128-129); R. M. Price, trustee (491); Vernon Price (521); Mrs. E. A. Proctor (549); S. J. Prose, succeeded by Charles E. Catoir and Joe P. Strathman (397); John H. Prosole, intervenor (85); Louis Prosole, intervenor (87); R. L. Pryor, successor to N. T. Neilson (563); Pyramid Lake Reservation (see United States).

(Q) G. B. Questa, succeeded by Mark L. Yori (302-303-404); Guilio Quilici, of successors to Walter Berry (470-471); R. Quilici and G. Panelli, successors to L. Garavanta (625); Peter Quillici, intervenor, successor to G. S. Denton

and G. Ricci (17); Abbie W. Quinn, intervenor, successor to Nancy J. Laughton (103); E. F. Questa (74).

(R) Antonio Raffetto (140-292-614); B. Raggio, succeeded by B. Rosasco (299-386); B. Raggio, succeeded by C. Maggiolo (300); B. Raggio, succeeded by Mark L. Yori (387); A. H. Ramelli, successor to J. McCollum (289); A. H. Ramelli, successor to Mary G. Bellamy and Mrs. G. R. Fettic (294); Alfonso Ramelli, successor to D. Rosasco and P. Rosasco (295); Caesar A. Ramelli (709-710-711-712-713-714); Matteo Ramelli, successor to Charles Maggiolo (388); Kathryn N. Ray, successor to Robert Jensen (496); Charles L. Raymond and Elizabeth E. Raymond, succeeded by C. L. Richards (378); Florence M. Read (430); Florence M. Read and Mrs. R. J. Read, succeeded by Mrs. Adalina Trosi (346-347-348); John Read; Antone Rebori (374); H. Reid, succeeded by Reno Golf Club (262); D. W. Reilly, successor to J. F. O'Brien (245); Mrs. M. Reilly (243); John Reinmiller (241); Reno Brewing Company, incorporated (400); City of Reno (371); Reno Golf Club, successor to L. W. Berrum (178-262); Reno Power, Light and Water Company, incorporated, succeeded by The Truckee River Power Company, incorporated, (95-96-99-100); Reno Power, Light and Water Company, incorporated, succeeded by R. C. Jensen, intervenor (131-132); Reno Press Brick Company, incorporated (272); Henrietta Revert, succeeded by Walts Brothers (93-724); J. P. Reynolds, successor to T. H. Blundell (630); G. Ricci, succeeded by Peter Quillici (17); A. L. Rice; Grant E. Rice, succeeded by Martin Jensen (591); Mary E. Rice, succeeded by W. G. Smith (265-462); Warren G. Rice, succeeded by A. Capurro (594); C. L. Richards, successor to T. Parry Tyson (377); C. L. Rich-

ards, successor to Charles L. Raymond and Elizabeth E. Raymond (378); Richardson and Degman, succeeded by Carl Elges (64); D. W. Ridenour, successor to W. P. Lyell (226-227); Henry Riter (291); Riverside Mill Company (10); F. Roberti, succeeded by Antone Borsi and Steve Borsi (53); Mrs. Lena Robertina, succeeded by Rick De Bernardi (56); Mrs. N. L. Robinson, succeeded by Mrs. N. L. Theuson (543); D. Rogero, successor to Schaffer Estate (390); B. Rosasco, successor to B. Raggio (141-299-386); Carlo Rosasco, succeeded by C. P. Ferrel (305-407½); Carlo Rosasco, successor to Schaffer Estate (407); D. Rosasco and P. Rosasco, succeeded by Alfonso Ramelli (295); G. Rosasco, intervenor, successor to I. J. Walker (126); Joseph Rosasco, intervenor (139); Fred Ross (26); O. C. Ross, succeeded by Andy Bonamici, G. Sorani and S. Sorani (581); F. M. Rowland (292); F. M. Rowland, succeeded by John Aratzabel (298); Joe Ryans and E. Hawkins, successors to J. J. Barton (154).

(S) John Sable (32); August Salet, successor to G. W. Ingalls and wife, Eliza Ingalls (396); John Salisbury, succeeded by Chris Theusen (90); John Salisbury (18); Signelio Salvatore (109-198); H. D. Sanborn, successor to George W. Mapes and J. J. Murray (96); Toni Saralagui, or Antonio Savellegin (239); P. Saturno, succeeded by Nora Clark (269-364); Viola M. Sauer and Ella Bailey (655-656-657-658-659-675); A. F. Scanarino (273); J. A. Scanavino (449); Margaret Schaffer Estate, succeeded by D. Rogero (390); A. E. Springer (395); Carlo Rosasco (407), and H. G. Humphrey (406); Scheeline Banking and Trust Company, succeeded by John P. Williams (628-629); Scheeline Estate and H. Fleishacker (588); Agostino

Schippecasse (148-229); Lizzie Schmitt (270½); J. H. Schroeder, successor to Mrs. Bessie Bovee (492); William H. Schroeder; Mrs. John Schwandt, successor to John Schwandt and A. R. Kosswig (567); F. Sciaroni (306); J. M. Scott, successor to Thomas Scott (309-408¾); Scott Ranch Ditch Company (490); Cora May Sellman (715); Antonio Semenza (585); W. L. Semenza and C. E. Mack; J. J. Shannon, intervenor (121); S. Sharp (35); John H. Sheehan, succeeded by John Gregorich (553); Mrs. Mary Sherman (127); Lucy E. Short and William C. Short, intervenors (480-481-482-483-484); Salvatore Signelic (109-193); Dora Silvey (589); G. A. Silvey and P. Casinelli, successors to John Gotalli (583); Mrs. L. Simas, intervenor (110); Frank Simoni and J. Simoni, intervenors, successors to A. Mosconi (106-107); Ella M. Smith (see now Ella M. Bailey); F. C. Smith, successor to T. J. Nash and Comer (565); L. D. Smith (652-653-654); Preston B. Smith (275); W. G. Smith, successor to Mary E. Rice (265-462); H. E. Snare, successor to Mary De Remer (442); W. M. Snare, intervenor (113-114); G. Sorani and S. Sorani, of successors to O. C. Ross (581); Mary Sorani and Plenio Sorani (529); Mrs. Sorenson, successor to Mrs. Lonkey and Mrs. Page (41); Charles T. Sorgi, successor to George W. Mapes (361); Nick Sorgi, succeeded by J. S. Lyons (646); Nick Sorgi, succeeded by Holcomb Brothers (669-702 to 705); South Side Drain Ditch Company, incorporated; South Side Irrigating Canal Company, incorporated (228); Southern Pacific Company, incorporated, lessee of Central Pacific Railway Company, incorporated (526-527); Spanish Spring Valley Ditch Company, incorporated (341); A. E. Springer, successor to Schaffer Estate (395); State of Nevada (see

Nevada, state of); Steamboat Canal and Irrigation Company, incorporated, successor to Steamboat Canal Company (16); Steele Corporation, (incorporated) (524-596); James Steele; Martha Steinberger, succeeded by Annie M. Matley and John B. Matley (519-522); C. L. Steiner, successor to R. N. Brannin (557); Henry Stephens, succeeded by S. Oppio (609); Mrs. S. M. Stephens, succeeded by N. B. Kyker (550); Carl Stoddard (449); Charles H. Stoddard (381-450); Cora N. Stoddard; J. E. Stout, successor to W. H. Davis (566); Joe P. Strathman and Charles E. Catoir, successors to S. J. Prose (397); Mrs. Clara Streiff, succeeded by G. Ginocchio (429); G. C. Stroder, succeeded by Mrs. Otto Holz (560); John B. Sturla, succeeded by M. P. Depaoli (641); Matie Summerfield, later Matie D. Carter, succeeded by D. C. Wheeler, Inc., (incorporated) (182-207); B. Sundin (333-334); A. F. Swall and Margaret A. Swall, succeeded by G. D. Maddalena, intervenor, (72-186); Emma J. Swan, successor to George Imes and Andrew Drake (436); Augusta Swanson (307-407¾; C. A. Swart, succeeded by F. M. Konkel and B. M. Konkel (558).

(T) Frances M. Taber, formerly Frances M. Whitburn (123-364½); Angeline Tachino, Guy Tachino, John Tachino, Joseph Tachino, Mary Tachino and Rosie Tachino (665-691-692); S. F. Tallman, succeeded by Mrs. E. A. Drolette (169); J. R. Tarner, succeeded by Anna Jensen (547); Sam Tarner, successor to Anna Taylor (546); C. L. Taylor and successors (398-399); Anna Taylor, succeeded by Sam Tarner (546); H. S. Teasdale, successor to W. H. Corbiere (556); Tessier (42); Chris Theusen, succeeded by Paul Garson, intervenor (46); Chris Theusen, successor to John Salisbury (90); Mrs. N. L. Theusen, successor to

Mrs. N. L. Robinson (543); Mrs. Alice Thoma, succeeded by Nevada Stock Farm, incorporated (452) and Truckee Meadows Slaughtering Company, incorporated (458); Peter Thomsen, successor to Stephen Ede and Phillip Ede (215-216-217); Reuben C. Thompson and Mabel E. Thompson (379); J. W. Titus, succeeded by Marino Melillo (170); Mrs. Adalina Trosi (337-338-346-347-348); Angelo Trosi, succeeded by J. E. Trosi (733-734-735); Truckee Meadow Slaughtering Company, incorporated, successor to Mrs. Alice Thoma (458); The Truckee River General Electric Company, incorporated, succeeded by Truckee River Power Company, incorporated, (5-6-7-8-9-96-97-98-99-100-359, 725, 726); Trustees, Reno Lodge No. 14, Independent Order of Odd Fellows, intervenors (120); Trustees Reno Lodge No. 13, Free and Accepted Masons, intervenors (120); Felix Turrillas and Amailo Yriarte, successors to James Burke and Peter Burke (288); R. C. Turritin, trustee (see Margaret Schaffer Estate); A. Turtarolo (23); T. Parry Tyson, succeeded by C. L. Richards (377).

(U) Lucy M. Ulyatt, succeeded by Alex Crotta (576-577); United States [Newlands Project, formerly Truckee-Carson Project; Derby Canal and Lahanton Reservoir (3), Lake Tahoe (4), Pyramid Lake Indian Reservation (1-2); Reno Indian Colony (499);] University of Nevada (281-384); University Stock Farm (264); Unknown Owners (28-33-43); Mary F. Upson (301).

(V) Blanche MaeBelle Vanderwerker (382½); Blanche MaeBelle Vanderwerker, succeeded by Julius Pieh (253); A. Van Derhoof, successor to Mrs. William Calligan and E. B. Graves (536); J. Vanetti, succeeded by L. A. L. Green

(661-673-674); Margaret Van Meter (331-332); Venanzio D. Andrea and A. Deini, successors to J. B. McCullough (345); Verdi Lumber Company, incorporated, (7-20); Verdi Municipal Use (45); Verdi School (44).

(W) Wadsworth Light and Water Company, incorporated, (13-14-15-635); I. J. Walker, intervenor (125); I. J. Walker, succeeded by G. Rosasco, intervenor (126); Morgan Wallace (555); Frederick Walts, Guy W. Walts and Herbert Walts, as Walts Brothers (251-453-454-455), successors to Henrietta Revert (93-724a-b-c-d-e); G. W. Walts (203); William Walts (252); Mrs. Minnie B. Ward, succeeded by Eli Gauthier and P. Leauthier (417); and John B. Matley and Annie M. Matley (518-523); George D. Washburn and Mary Washburn, successors to S. F. Washburn (632); Henry Washburn (633); Washoe County [Hospital (497), Verdi School (44)]; Washoe Lake Reservoir and Galena Creek Ditch Company, incorporated (660 to 672); Washoe Power and Development Company incorporated, succeeded by Truckee River Power Company, incorporated (8-96-97); Robert Watson (423); Wells Estate Company, incorporated (428); Otto Werner, successor to Katherine Werner (365); C. W. Westover (158); D. C. Wheeler, Inc., (65-181-182-195-207 to 208½-721-722-723); successors to Matie D. Carter (182-195-207); successors to Nevada Gunite Manufacturing and Construction Company, incorporated (246); succeeded by University Stock Farm (264); Mrs. N. J. Wheeler (715); Frances M. Taber, formerly Frances M. Whitburn (123-364½); Samuel Wilbur (425); Sam M. Wiley (24); Emma J. Williams, later Emma J. Marble (485-486-487-488-489); J. F. Williams, succeeded by C. M. Copelin and Mrs. P. E. Ful-

wider (545); John P. Williams, successor to Thomas Hill (628-629); R. W. Williams, succeeded by E. S. Heward (389); William H. Winfrey and Edwin E. Winfrey, succeeded by H. G. Humphrey (439) and Pietro Casinelli (403); Christ T. Wogan (737-738); J. L. Wollam, intervenor (115); J. L. Wollam (268) and succeeded by F. V. Avilla, intervenor (119); Elizabeth J. Wright, John W. Wright, Sarah M. Wright and Walliam G. Wright (221-222); H. Reid, succeeded by Reno Golf Club (262); J. M. Wyckoff, successor to James Jepsen (537); Wilkinson Brothers and Ennor, successors to T. S. Ferretto and to others (179½-206-259).

(Y) Mrs. Marie Yori (603-604), successor to George S. Phoenix (249); Mark L. Yori (502), successor to Eddystone Farm and Produce Company and G. B. Questa (302-303-404), successor to B. Raggio (387); M. Yribarren, succeeded by M. Pradere (340).

(Z) D. Zolezzi, succeeded by Stefano Capurro and David Gardella (736); Gerolemo Zolezzi, intervenor, successor to G. Fellipelli (86).

(AA) Ackerman, Glenn W. & Ruth (247); Acrea, D. L. (431, 432); Adams, Wayne B. (250); Agnes, John (458); Aguerrebere, Martin (138); Ah You Est., A. R. Schindler, Trustee for Wayne & Roland Asher (250); Aldabe, Bert & wife Marie (119); Alexander, Henry (247); Allen, Ira T. & wife (179); Allison, Geo. (278, 287, 304); Altic, Edith B. & A. L. (366); American Loan Society (454); Anderson, Chas. J. (367); Anderson, Irene (574, 575); Anderson, Pete (208); Anderson, Robb & wife Ida (232); Anderson, Tom & Mildred (452); Anderson, Wm. H. & wife Zelia

A. (250); Andrews, W. L. (208); Annett, Sheldon & Audrey (249); Arden, John (59); Arigoni, A. M. & wife Natalie (247); Armstrong, Alice Powers (64, 173); Atcheson, Katherine C. (48); Atkinson, Frances B. (177); Atkinson, Paul E. & wife Marie (119); Aust, W. T. (244); Austin, W. C. (....); Avansino, John (184, 214); Avansino, Louis (143); Avansino, William and Silvio (368); Avanzino, Jack (597); Avanzino, John L. (368); Avanzino, Thomas (457); Ayres, Irvin L. (55); Azcarata, Frank (622); Aznarez, Eusebio (247).

(BB) Baggenstos, Manual (489); Baker, Ella A. (574), 575); Baker, Harold (574, 575); Baker, Herman (574, 575); Baker, Isabelle (574, 575); Baker, Nellie (574, 575); Baker, Mildred Hobe & Charles J. (717); Balatti, Louis A. & wife Hazel (459); Bamberger, Geo. E. (503, 504, 505); Barbagelata, Joe (592); Bares, Raymon F. & wife Pauline (249); Barlow, Wm. H. & wife Lennie (452); Barry, Mrs. Clara (207); Bartholomew, Frank & Antonia (274); Bazell, Novice & Nable (502); Beasley, Bud L. & wife Nellie E. (55); Beecher, Helyn (177); Beecher, Wm. T. & wife Janett (247); Beedle, Hadley (250); Beemer, Louise B. (454); Beemer, William (55); Beko, Tom & Willie (454); Belford, John S. (191); Bell, Enock J. & wife Carrie (209, 210); Belli, Mario (50, 50a, 97, 97a); Belmont, Adeline (454); Bennett, Delbert & wife Marjorie R. (454); Benson, Wm. B. & wife Anna (424, 425); Berg, Carl & wife Erma (177); Bergeret, L. A. (235); Bergstrom, R. H. (467, 468); Bernhard, Fred & wife Hazel (247); Berry, Paul & Gladys (456); Berrum, Karoline (261); Bertoluochi, C. A. (454); Bevilacqua, Emilio (209, 210); Biltz, Norman (64, 178½, 204, 206, 247, 249, 250); Birdsall, Fred R. & Celia T. (454);

Bishop, Loen F. & wife Ruby A. (153); Bitner, E. Clyde & wife Angeline (249); Black, Alton & wife Louise (208); Black, Edna May (177); Blackmar, Francesca (628, 629); Block, P. G. (431); Blumberg, Kitty (208½); Bohal, Les (205); Bonham, Greely W. (431, 432); Bonnell, Eulah (177, 512); Bosq, August (136, 136a); Bottomly, Ralph (177); Bowen, Grant L. & wife True Gifford (247); Boyd, John B. (130); Boylan, Anna C. (358-359); Boswell, Alice (409); Boyne, Albert B. (454); Brennan, Austin J. & Margaret (123); Bresson, Ernest E. & Raymond Keller (428); Britnell, Lawrence (498); Browder, M. D. (205); Brown, Carl & Nellie (498); Brown, E. L. (431, 432); Brown, Elmer L. & wife Marine (431, 432); Brown, F. W. & wife Anna (209); Brown, Mrs. H. H. (457); Brown, Hazel & Howard (179, 251, 252, 205); Brown, Irvin C. & wife Jean Filler (133); Brown, Julia Angeline (141, 299); Brownell, Earl & Myrtle (498); Brundidge, Alva A. (454); Brunetti, Frank & Nancy (744); Brussard, Wm. & wife Evelyn (208); Bryson, Lena (249); Bunge, L. W. & wife Helen (136, 136a); Burchett, Chloe (.....); Burge, Lee and wife Mildred (206); Burke, N. E. & wife Virginia M. (191); Buchanan, Freeman M. & wife Lida M. (133); Burns, Robt. James & wife Kathryn Pine (247); Burris, Charles W. & wife (699, 699a); Buscaglia, D. (181, 208); Busey, Douglas A. & wife (243); Bushing, Clarence H. (534); Butler, Fred & Violet (452); Butner, W. R. & S. (208½); Bates, Geo. & Earl, Geo. Wilkinson (412); Browne, J. J. & Nevada L. (431); Bruce, Martha R. (431); Bruce, M. R. & Mary I. Ryan (431).

(CC) Cafferata, August J. (621, 623); Cafferata, F. J. (529); Cafferata, Harold & wife Janet R. (243); Cafferata, M. E. (408); Caffrey, Willis & wife Dorothy (72b, 73, 76);

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Thelma E. (454); Russell, George H. & wife Dorothy Peary (209); Ryan, Elizabeth (154); Ryan, John J. (208½); Ryan, Paul (431).

(SS) Sandry, Ernest L. (209, 210); Saturno, Joseph & Victor (231, 356); Sauer, George (208½); Sauer, Richard P. & wife Lucille B. (454); Savage, Leonard C. & wife Gertrude (64, 173); Saviers, C. E. & wife Bessie (64, 173); Saxby, Harvey B. & wife Rachel (133); Scanavino, Joe (58); Scarlett, J. B. (438, 443, 206); Schauer, Karl & wife Madeline (208); Schiappicasse, Mary (148, 229); Scheuller, Albert & wife Virginia J. (178½, 205); Schmidt, Roy B. & wife Louise (431); Schmith, Louis (434); Schragle, Albert (431, 432); Schneider, Jess & Audrey (498); Schroeder, Arthur A. (194); Schutz, J. F. (177, 244); Schutz, Mary E. (498); Scolari, Lizzie & Oscar (53); Scossa, Eugene (707); Scott, Ernest & wife Irene (247); Scott, J. M. (202, 203); Scott, Wm. Keith (454); Scott Motor Company (179, 206); Sealy, Ida M. (407½, 407¾); Sears, Cushman and Velma Irene (357); Secord, Walter & wife Amy Myrtle (208); Seeds, Dorsie C. (244); Seely, Edgar J. & Lorna (431); Sciarroni, Frank (202, 203, 206); Sellman, Cora May (454); Seltzer, Richard L. & Cora (456), Semenza, Maria (585); Senseney, H. M. (208½); Serpentino, Annie Marie (141, 299); Sesinger, William (133); Shaber, Geo. B & Ethel M. (452); Shaddock, Geo. & wife Sarah (494); Shair, Fred Jr. (152); Shaw, Ruth L. (244); Sheen, Byrul L. & Loretta J. (452); Sherman, C. L. (177); Shidler, Wilbur K. & Mary B. (133); Shirton, Lorne M. & Eleanor (244); Short, Chas. H. (250); Shriver, W. Henry Clay (736); Sierra Pacific Power Company (95, 95a, 96, 99); Silva, Manuel B. (102, 128, 129, 142);

Silver State Lodge (271); Skipper, C. H. (452); Slingerland, J. E. (191, 251); Smellie, Ernest & Carolyn D. (454); Smilenick, George & wife Bobbie (454); Smith, Atly A. (498); Smith, David Roy (652, 653); Smith, I. J. (250); Smith, James M. (454); Smith, P. B. & wife Ida (133, 357); Smith-Peterson Co. (401, 402, 357, 398, 520); Smith, Ralph D. (578, 324); Smith, Roy (654); Smith, Sargent (408); Snyder, Howard & Alice (452); Sobrio, Alex B. & wife Bonnie J. (358); Solari, Camile & wife Julia (179); Solseth, Oliver H. (454); Sorge, Nick (226, 277, 361, 362); Souter, Clyde D. (243); Souza, Fred (128, 129); Spangler, Jack & wife Elsie E. (454); Spencer T. D. & Marion (136, 136a); Spezia, I. T. & Bertha (271); Spradling, Geo. M. & wife Irene F. (454); Springer, C. R. (743); Springer, Edgar J., Clarence Floyd & Solomon J. (743); Springmeyer, Sallie R. (250); Staats, Everett F. & wife Evleyn (209); Stadtmuller, Clara F. (154); Stahr, Roland & Dudley C. (454); Standard Oil Company (271); Stanley, Carle B. & wife Alys (454); Starr Rock & Sand Co. (408); Stead, James E. & wife Marian M. (343, 346, 347); Steele, Mary A. (524, 596); Stephens, Grace (244); Stevens, Harold (571); Stewart, Bradley (251); Stewart, T. K. (498); Stillwell, Allen C. (153); Stinton, Frank A. & wife Kathryn (454); Stoddard, Carl (128, 129); Stoddard, Daisy E. (381); Stone, Jewell F. & wife Valeria (408); Stover, J. H. & Gladys R. (443); Strosnider, Jessie (67); Steinheimer, Edward (177); Sturn, Wm. & Hattie (209); Suffall, Bessie C. (206); Sutherland, E. G. (256); Sutherland, J. B. (389); Sutton, Walter A. & M. Catherine (133); Swalley, R. J. (177, 204, 261); Swan, Mrs. E. J. (249); Swanholm, Carl S. & wife Elizabeth B. (454); Swanson, Harry & wife Cleo (178½,

205); Sweetland, Cora E. (208); Swesey, Alfred C. & wife Nellie (441); Swing, Ed (443); Swope, Carroll C. & wife Anna L. (133).

(TT) Tacchino, A. (409); Tait, J. R. & wife Catherine (256); Talbot, W. C. (206); Tolotti, Emil P. & wife Helen M. (249); Tamka, Harold W. (206, 251); Tarner, Ada M. (738); Taylor, T. L. (431); Teglia, Roger (407); Thatcher, Reno (213); The Bee Inc. (574); Thomas, Helen Marye (644); Thomas, Richard F. (153); Thompson, Christie (454); Thompson, Rader (232); Thompson, Walter (244); Thomsen, Mary (215, 216, 217); Threlkel, J. R. (401, 402); Todd, John (431); Tolotti, Albert & Mary (357); Touzen, Claude W. (133); Trosi, Emma Herz (337, 338); Tunison, Edna Marie (153); Turner, Courtney S. (206); Tyler, Ralph & wife Viola (431).

(UU) United Air Lines (.....); Union Ice Company (271); Union Paving Company (407, 408); Urrutia, Salvador (637).

(VV) Valley Concrete Pipe & Products Co. (Nevada Concrete Pipe Co. (409); VanDover, Harry (558); Vargas, George (395, 408); Voss, E. J. (208); Vhay, David & wife Mary Ellis (179).

(WW) Wagner, D. E. & Helen (178½); Waggoner, Ralph B. & wife Hildreth (452); Walling, Nettie Grace (452); Waltz, Fred C. & Ione V. (454); Walters, Patrick R. & Wife Elizabeth F. (108, 52½); Wanke, Bert R. (743); Warner, Charley (247); Warren, Geo. F. & wife Margaret (177); Washburn, Wesley A. (632); Watkins, Wellesley Walter & wife Eria (152); Webb, Wm. L. & Myrtle

(244); Wells, Howard T. & Gertrude M. (620); Wells, R. C. & wife Willafred C. (249); Wells, Wm. & wife Caney (452); Weisenfluh, Louis H. & Clara A. (454); West, Cecil G. & wife Belle (331); Western Lands Inc. (249); Western Pacific Railroad Co. (.....); White Pine Lumber Distrib. Corp. (177, 206, 221); Westover, Pauline (158); White, Theda F. (256); White, Virginia (454); Whitely, Wilson A. (178½, 205); Whittell, George (247); Whitty, R. C. & wife S. E. (719); Wilbur, Leonard & wife (153); Williard, J. H. (431); Williams, F. A. (279); Williams, Paul C. (244, 280, 130); Williams, Tytus & Gladys (382); Willis, Meredith (717); Wills, C. P. & wife Evelyn (717); Willshire Oil Co. Inc. (452); Wilson, Dudley E. & wife Marie (179); Wilson, Mary E. (165½, 168, 646, 646½); Wine, W. H. & Emma (250); Wohlbruck; Harriet S. (4o2); Wolfersberger, Edward (208½); Woodward, O. Frank (64, 173); Woody, Mae & Fred (431, 432); Worden, Clarence (203); Wilcox, Maud (452); Wilkins, Lawrence Joe & wife Freda (55); Williams, Elsa & Stuart L. (243); Wright, Claire Gleason & Billie Gail Orton (133); Wright, Irvin C. & wife Pearl (121, 368). Washoe County Water Conservation District.

(YY) Yates, Carrie (179); Yoakum, Dagmar & Emil (208½, 181); Yori, Geo. H. & wife Vera (302); Yori Land & Livestock Co. (302, 387, 404, 502); Yori, Mark Jr. (502); Young, Irvin J. & Georgia M. Young (250).

(ZZ) Zenklusen, Frank (590); Zubieta, Frank (567); Zumoff, Harry & wife Anna B. (209, 210); Kempton, L. A. and Kempton, Genevra (514, 601, 602).

Solicitors for the United States: Ethelbert Ward, John F. Truesdell and Oliver P. Morton, special assistants to the Attorney General, William Woodburn, as former United States Attorney for the District of Nevada; George Springmeyer, United States Attorney for the District of Nevada, and R. G. Withers. Solicitors for numerous defendants are as hereinafter designated.

It is hereby ordered that all persons herein named as owners, grantors and successors be made and considered parties to this action and that all parties herein named as grantees or successors be substituted for their respective predecessors.

ERRATA SUPPLEMENT

Page 8, first column, line 45, "the name of which was changed to, and at the date of this Decree is Sierra Pacific Power Company," should be substituted for "succeeded by Truckee River Power Company, incorporated,".

Page 8, second column, 4th line from the end of subdivision (W), the name "Walliam" should be "William."

In all tabulations where the same appears, the "Solicitor" column should be eliminated.

Page 14, claim 50a, the name "Cardella" should be "Gardella."

Page 17, claim 78, the name "Degioranni" in both instances should be "Degiovanni."

Page 29, claim 209, the following description of lands should be inserted in appropriate columns as indicated:

¼	In of	¼	Sec.	T-N	R-E
NW		NW	31	19	20
SE		NW	31	19	20
NE		NW	31	19	20
NW		NE	31	19	20
SW		NE	31	19	20
SE		NE	31	19	20
NE		NE	31	19	20
SW		NW	31	19	20
NW		NW	32	19	20
SW		SW	29	19	20

Page 34, claim 272, the name "Reno Pressed Brick Company" should be "Reno Press Brick Company."

Page 37, claim 335, "283" in "Acre Feet" column should be "382."

Page 39, claim 350a, "388" in "Acre Feet" column should be "361."

Page 47, claim 442, "60" in "Acre Feet" column should be "40."

Page 56, claim 529, the name "Soroni" should be "Sorani."

Page 56, claims 526 and 527, "5.75" in "Sec. Feet" column should be "2.75."

Page 65, claim 617, the name "Keppe" should be "Kleppe."

Page 66, claim 623, the name "Largmarsino" should be "Largomarsino."

Page 71, claim 642, "457" in "Acre Feet" column should be "957."

Page 75, claim 665, the name "Angelina" should be "Angeline."

Page 77, claims 691 and (665), the name "Josie" should be "Rosie" in each instance.

Pages 77 and 80, the column headings designated "In ¼ of ¼," "Sec.," "T-N," and "R-E" and those designated "Approximate Diversion," "Inches," "Sec. Feet," and "Estimated Transit Loss %," should be transposed.

Page 82, claim 720½, the name "Domingo" should be "Domengo."

FINAL DECREE

This cause having been heretofore heard by the Court and, following argument by counsel, the matter having been referred to George F. Talbot, as Special Master, and the said Special Master having thereafter rendered his report and made his findings, and the same having been approved and adopted by the Court (except as disallowed or modified by the Court) by a certain order termed "Temporary Restraining Order" made and entered in said cause under date of February 13, 1926:

NOW, THEREFORE, in accordance therewith, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

That the parties, persons, corporations, intervenors, grantees, successors in interest and assigns and substituted parties above and hereinafter named and their successors in interest and assigns are, and each of them is, as against every other one, hereby adjudged to be the owners of the water rights hereinafter specified and set forth and entitled and allowed to divert and use, from the Truckee River and its tributaries and from the streams, springs, drain and waste waters hereinafter mentioned, and by and through their respective ditches, canals, flumes, dams and reservoirs, for the irrigation of their respective hereinafter described lands, for generating electricity and power, for municipal purposes, for supplying the people living in cities and towns, for reclamation of arid lands, for watering livestock, for domestic uses and other beneficial purposes, water in the respective amounts and subject and according to the respective dates of appropriation and priorities as hereinafter stated, found and allowed.

TRUCKEE RIVER DIVERSIONS

Government Rights

INDIAN DITCH

Claim No. 1. By order of the Commissioner of the General Land Office made on December 8, 1859, the lands comprising the Pyramid Lake Indian Reservation were withdrawn from the public domain for use and benefit of the Indians and this withdrawal was confirmed by order of the President on March 23, 1874. Thereby and by implication and by relation as of the date of December 8, 1859, a reasonable amount of the water of the Truckee River, which belonged to the United States under the cession of territory by Mexico in 1848 and which was the only water available for the irrigation of these lands, became reserved for the needs of the Indians on the reservation.

For the irrigation of 3130 acres of Pyramid Lake Indian Reservation bottom lands, plaintiff, the United States of America, is entitled and allowed to divert from the Truckee River through the Indian Ditch, the intake of which is on the left bank of the river in Section 18, T. 22 N., R. 24 E., Mount Diablo Base and Meridian, not exceeding 58.7 cubic feet of water per second to an amount not exceeding 14,742 acre feet of water in any calendar year with a priority of December 8, 1859; provided the amount of water so to be diverted shall not exceed a flow of one miner's inch, or one-fortieth of one cubic foot per second per acre for the aggregate number of acres of this land being irrigated during any calendar year and the amount of water applied to the land after an estimated transportation loss of 15 percent, shall not exceed 85-100 of an inch or 85-100 of one-fortieth of one cubic foot per second per acre for the total

number of acres irrigated, and provided that the amount of water so diverted during any such year shall not exceed 4.71 acre feet per acre for the aggregate number of acres of this land being irrigated during that year, and further provided that the amount of water applied to the land shall not exceed four acre feet per acre for the aggregate number of acres of this land being irrigated during any calendar year.

This water is allowed for the United States and for the Indians belonging on said reservation and for their use and benefit and is not allowed for transfer by the United States to homesteaders, entrymen, settlers or others than the Indians in the event that said lands are released from the reservation or are thrown open to entry or other disposal than assignment or transfer to the Indians.

Claim No. 2. In addition to water for the above mentioned 3130 acres of Pyramid Lake Indian Reservation bottom lands, the Government is hereby and will be allowed to divert water from the Truckee River, with a priority of December 8, 1859, to the amount of one-fortieth of one cubic foot per second per acre for the irrigation of 2745 acres of Pyramid Lake Indian Reservation bench lands. The water so allowed for bench lands may be diverted from the Truckee River through the Truckee Canal or any other ditch now or hereafter constructed as the plaintiff may desire or authorize; provided that the amount of water for bench lands shall not exceed during any calendar year 5.59 acre feet per acre diverted from the river, nor exceed during any calendar year 4.1 acre feet per acre applied to the lands, for the aggregate number of acres of this land being irrigated during any year.

This water is allowed for the United States and for the Indians belonging on said reservation and for their use and benefit and is not allowed for transfer by the United States to homesteaders, entrymen, settlers or others than the Indians in the event that said lands are released from the reservation or are thrown open to entry or other disposal than assignment or transfer to the Indians.

DERBY DAM AND TRUCKEE CANAL

Claim No. 3. Under the Reclamation Act of June 17, 1902, the United States, acting by the Secretary of the Interior, on July 2, 1902, withdrew from public entry, excepting under the homestead laws in accordance with the provisions of the Act, the lands required for the Government's first reclamation project, now known as the Newlands Project. Thereupon and with due diligence the United States proceeded with the construction of the Derby Dam across the Truckee River in the SW¼ of Section 19, in T. 20, N., R. 23, E., Mount Diablo Base and Meridian, and with the construction of the Truckee Canal, with a carrying capacity of 1,500 cubic feet of water per second, running from this dam a distance of 31 miles to the Lahontan Reservoir on the Carson River, and with the construction of the Lahontan Reservoir, with a storage capacity of 290,000 acre feet, and with the construction of about 250 miles of lateral and sub-lateral irrigation canals sufficient for carrying water for the irrigation of 151,000 acres. On April 30, 1919, the Government had expended for this project $6,252,000.00. The lands so withdrawn for reclamation are naturally dry and arid and without the application of water

are of little or no value, but with irrigation will produce valuable crops and furnish homes and support for a large population.

Subject to prior appropriations and vested rights permitted and confirmed by the Act of Congress of July 26, 1866, the plaintiff is entitled and allowed to divert, with a priority of July 2, 1902, through the Truckee Canal 1,500 cubic feet of water per second flowing in the Truckee River for the irrigation of 232,800 acres of lands on the Newlands Project, for storage in the Lahontan Reservoir, for generating power, for supplying the inhabitants of cities and towns on the project and for domestic and other purposes, and under such control, disposal and regulation as the plaintiff may make or desire, provided that the amount of this water allowed or used for irrigation shall not exceed, after transportation loss and when applied to the land, 3.5 acre feet per acre for the bottom lands, nor 4.5 acre feet per acre for the bench lands under the Newlands Project.

LAKE TAHOE STORAGE

Claim No. 4. Under the Reclamation Act and for irrigation and other beneficial uses on lands under said project and on lands within the basins of the Truckee, Carson and Humboldt rivers in Washoe, Storey, Lyon, Churchill and Humboldt counties, in the State of Nevada, and pursuant to notice posted, by direction and authority of the Secretary of the Interior and for and on behalf of the United States, on the right bank of the Truckee River at the site of the dam in said river near Tahoe City and in Placer County, California, and about 500 feet downstream

from Lake Tahoe, on the 21st day of May, 1903, plaintiff is entitled to, and is allowed with a priority of that date and during all seasons of the year, to have flow into and to hold and store in Lake Tahoe and in a reservoir made of said lake by a dam at said site in said river constructed with the spillway crest thereof six feet above the floors of the flow-ways of said dam as then existing, all waters of or coming into said river or said lake, both surface and under flow, to the extent of 3,000 cubic feet per second and to the extent of the capacity of said lake as a reservoir made by said dam, to said height and subject to the continuous out-flow through said river from said lake or reservoir so made by said lake or dam, of such an amount of water as plaintiff may desire to release or may discharge from said lake or reservoir not exceeding at any time a flow of 3,000 cubic feet of water per second.

In addition to the above specified rights, the United States is entitled to store, discharge and control water in Lake Tahoe as provided in the judgment and decree filed and entered on June 4, 1915, in the case of the United States, plaintiff, versus The Truckee River General Electric Company, a corporation defendant, in the District Court of the United States in and for the Northern District of California, Second Division, and subject to said decree the United States shall be entitled to discharge from Lake Tahoe an amount of water sufficient to deliver to the head of the Truckee Canal at the Derby Dam, after transportation loss, 1,500 cubic feet per second. The plaintiff is entitled and allowed at will to release and discharge any of the water stored, or by this decree allowed to be stored, in Lake Tahoe and to flow the same and any other

water to which it is entitled, according to its priority, through the Truckee River to the Derby Dam and there divert the same through the Truckee Canal for irrigation, for storage in the Lahontan Reservoir, for generating power and for other purposes. The rights of said defendant Sierra Pacific Power Company (formerly The Truckee River General Electric Company) under said judgment and decree are hereby recognized and confirmed.

Power Ditches

FARAD PLANT

Claim No. 5. The Sierra Pacific Power Company, a corporation owner, is entitled and allowed to divert at all times from the Truckee River through the Farad Power Flume, which has its intake on the north bank of the Truckee River in the S½ of Lot 6 in the NW¼ of Section 30, Township 18 North, Range Eighteen East, sufficient water, with a priority of the year 1899, to deliver, after transportation loss, to the wheel of the Farad Hydro-Electric power plant, 325 cubic feet of water per second and sufficient additional water with a priority of 1906 to deliver, after transportation loss, to the wheel of said plant, 75 cubic feet of water per second, said plant being situate in the SE¼ of Section 12, Township 18 N.R. 17 E., for the generation of electric power in said plant.

FLEISH PLANT

Claim No. 6. The Sierra Pacific Power Company, a corporation owner, is entitled and allowed to divert at all times from the Truckee River through the Fleish Power Ditch and Flume, which has its intake on the east bank

of the Truckee River in the SE¼ of Section 6, Township 18, N. R. 18 E., sufficient water with a priority of February 16, 1904, to deliver, after transportation loss, to the wheel of the Fleish Hydro-Electric power plant, 327 cubic feet of water per second, said plant being situate in the NE¼ of the SE¼ of Section 30, Township 19 N. R. 18 E., for the generation of electric power in said plant.

VERDI PLANT

Claim No. 7. The Sierra Pacific Power Company, a corporation owner, is entitled and allowed to divert at all times from the Truckee River through the Verdi Power Ditch and Flume, which has its intake on the east bank of the Truckee River in the SE¼ of the SE¼ of Section 19, T. 19 N. R. 18 E. sufficient water, with a priority of October 21, 1909, to deliver, after transportation loss, to the wheel of the Verdi Power Plant 399 cubic feet of water per second, said plant being situate in the SE¼ of Section 8, T. 19 N. R. 18 E. for the generation of electric power in said plant.

In addition to such diversion for power purposes, Sierra Pacific Power Company, a corporation, is allowed to divert from said river through the Verdi Power Ditch 220 inches or 5.50 cubic feet of water per second for supplying the Katz Ditch for irrigation to the extent and with the priority hereinafter allowed to this company, for the Katz Ditch under irrigation rights.

In addition to such diversions for power purposes and for so supplying the Katz Ditch with water for irrigation, Sierra Pacific Power Company, a corporation, is entitled

and allowed to divert and transport from the Truckee River, through the Verdi Power Ditch and Flume and to deliver to Verdi Lumber Company, a corporation, and Verdi Lumber Company is entitled to have diverted from said river through said ditch and flume by, and to receive from the Sierra Pacific Power Company, 100 inches of water with a priority of the year 1894 for supplying and maintaining the log pond of the Verdi Lumber Company in the Town of Verdi, and for logging and saw mill purposes.

WASHOE PLANT

Claim No. 8. The Sierra Pacific Power Company, a corporation owner, is entitled and allowed to divert at all times from the Truckee River through the Washoe Power Ditch and Flume, which has its intake on the south bank of the Truckee River, in the NW¼ of the NE¼ of Section 16, T. 19 N. R. 18 E. sufficient water, with a priority of October 27, 1902, to deliver, after transportation loss, to the wheel of the Washoe Hydro-Electric Power Plant 396 cubic feet of water per second, said plant being situate in the SW¼ of the SW¼ of Section 14, in said township and range, for the generation of electric power in said plant.

Of the water so allowed to be diverted through the Washoe Power Ditch and Flume, Sierra Pacific Power Company is allowed to use during the irrigation season 12.4 inches or .31 cubic feet of water per second, not exceeding a seasonable amount of 50 acre feet for the irrigation of 12.4 acres of its land as hereinafter described and provided under Washoe Power Ditch under irrigation rights.

Also of the amount of water allowed to be diverted through the Washoe Power Ditch, Sierra Pacific Power Company is entitled and allowed to deliver to the defendant Leonidas Frederick Johnson and he is entitled and allowed to have and receive from Sierra Pacific Power Company, 50 inches or 1.25 cubic feet of water per second, to the seasonal amount of 257 acre feet, for the irrigation of his lands as described and as provided hereinafter under Washoe Power Ditch under irrigation rights.

RENO PLANT

Claim No. 9. The Sierra Pacific Power Company, a corporation owner, is entitled and allowed to divert at all times from the Truckee River through the Reno Power Ditch and Flume, which has its intake on the south bank of the Truckee River 1365 feet north, 35 degrees west from Quarter Section corner between Section 15 and 16, T. 19 N. R. 19 E. sufficient water with a priority of March 31, 1891, to deliver, after transportation loss, to the wheel of the Reno Hydro-Electric Power Plant, 250 cubic feet of water per second, and sufficient additional water with a priority of November 1, 1909 to deliver after transportation loss, to the wheel of said plant 46 cubic feet of water per second, said plant being situate in NE¼ of NE¼ Section 15, in said township and range, for the generation of electric power in said plant.

In addition to such allowed diversions for power purposes through the Reno Power Ditch and Flume, Sierra Pacific Power Company is entitled and allowed to divert from the Truckee River and convey through said ditch and flume and deliver to defendants Sarah McClure, James

Murray, William Murray and Sam Murray and their successors, and they are entitled and allowed to have and receive from said company, 50 inches of water for the irrigation of their lands as hereinafter described and provided under Indian Flat Ditch under irrigation rights.

RIVERSIDE MILL DITCH

Claim No. 10. The Riverside Mill Company, incorporated, owner, is entitled and allowed to divert at all times from the Truckee River, through the Riverside Mill Ditch and Flume, which has its intake on the north bank of the Truckee River at a point 84 feet westerly from the center of Chestnut Street in the City of Reno and in the NW¼ of the SE¼ of Section 11, T. 19, N., R. 19, E., 70 cubic feet of water per second with a priority of May, 1863, for operating the Riverside Flour Mill in the City of Reno and for generating power and for milling purposes.

WADSWORTH POWER PLANT

(Solicitor: James T. Boyd)

Claim No. 13. The Wadsworth Light and Power Company, incorporated, owner, is entitled and allowed to divert at all times from the Truckee River, through the Wadsworth Light and Power Company Ditch, which has its intake on the north bank of the Truckee river in the NW¼ of the SW¼ of Section 13, T. 20, N., R. 23, E., Mount Diablo Base and Meridan, 31.3 cubic feet of water per second with a priority of June 26, 1897, for delivering, after an allowed transportation loss of 20 per cent, 25 cubic feet of water per second to the wheel at the pumping and power plant of this company, situated in the SE¼ of the

SE¼ of Section 33, in T. 21, N., R. 24, E., M.D.M., for the operation thereof and for pumping and for generating electrical and other power.

WADSWORTH WATER SUPPLY

(Solicitor: James T. Boyd)

Claim No. 14. In addition to the amount of water so allowed to be diverted for generating power, for pumping and the operation of its plant, the Wadsworth Light and Power Company is entitled and allowed to divert at all times from the Truckee River through its said power ditch, for supplying the Town of Wadsworth and the people living in or near this town with water for fire protection, for the irrigation of their lawns, gardens and lands, and for household and other purposes, 3.13 cubic feet of water per second with a priority of June 26, 1897, for the delivery, after an allowed transportation loss of 20 per cent, of 2.5 cubic feet of water per second to the reservoir of said company in the SE¼ of the SE¼ of Section 33, in T. 21, N., R. 24, E., M.D.M., and to said people for said purposes. (See Irrigation Rights for irrigation water allowed under this ditch, No. 635.)

WINTER DITCH REGULATION

The owners and operators of ditches through which the diversion of water is allowed for generating electricity and power and for milling, mechanical and municipal purposes, and for supplying the inhabitants of any city or town, whenever ice shall collect in any of their ditches, shall be allowed to divert from the Truckee River and use such additional amount of water as may be required for

flushing out such ice and so long only as may be required for such flushing, provided that the water diverted for such flushing shall not in any case be more than 20 per cent of the amount which is fixed and allowed by this decree to be diverted through the ditch in which said flushing is done.

All water diverted or used for generating electricity or power or for operating mills or power plants shall be returned directly to the Truckee River after being so used. Extra water for preventing congestion by ice and for flushing ice allowed to be used in ditches supplying water for municipal purposes when required must be returned directly to the river when used for these purposes.

IRRIGATION RIGHTS

The parties, persons and corporations hereinafter named and their grantors and predecessors in interest have acquired rights of appropriation in, and have diverted and appropriated from the Truckee River and its tributaries and used for the necesary irrigation of their respective hereinafter described lands, water in the respective amounts and under the respective priorities as stated in the following table. As shown by the following tabulations and columns, each of the parties, persons and corporations named in the columns headed, 'Owner," directly or by his, her or its grantor or predecessor in interest, on and continuing after the date in the columns headed "Date of Priority" and opposite his, her or its name or described lands, from the stream last named above his, her or its name or in connection therewith, and through the ditch or ditches named in the columns headed "Ditch" and opposite his, her or its name or described lands, for the necessary irrigation of his, her or its lands as described

opposite his, her or its name and in the columns under the words "Acres Irrigated" and following columns, diverted and appropriated water in the amount or amounts stated opposite his, her or its name or described lands and in the columns, headed "Approximate Diversion," and water sufficient to deliver to his, her or its said lands after transportation loss, the amounts in flow and acre feet per season stated opposite his, her or its name or described lands and in the columns under the words "Amount Allowed Delivered to Land":

* * * * *

[Pages 13-86 of the Decree, containing a tabulation of the diversion points, acreage, season of diversion and water right entitlements for each individual claim, are omitted from this Appendix.]

* * * * *

GENERAL PROVISIONS

In the foregoing table and columns pertaining to irrigation water rights the word, "Direct," means that the acreages specified thereunder are irrigated by water hereby allowed to be diverted from the river, creek or stream last named above the acreage; the word, "Drain," means that the acreages thereunder are irrigated by drain or waste water hereby allowed and ordered for the irrigation thereof; the word, "Season," means the time in any calendar year when irrigation may be needed; the word, "Priority," means the time when the water right was initiated. "Inch" means one-fortieth (1/40th) of one cubic foot per second, which, in general is the amount of water which will flow through an orifice having an area of one square inch, under a pressure of six (6) inches at the center of the opening. "Acre Foot,"

means the amount of water which will cover an area of one acre to a depth of one foot.

All of the above described ditches, lands and sections are in townships north and ranges east, Mount Diablo Base and Meridian. All of the irrigated lands are in the State of Nevada, except a part of the tracts listed under Dog, O'Neil, and Sunrise creeks. All of the ditches, canals and flumes are in the State of Nevada excepting the Farad and the upper end of the Fleish. Lake Tahoe is partly in Nevada and partly in California and the outlet of the lake to the Truckee River and the dam controlling the storage in the lake are in the State of California.

Without the application of water thereto the above described lands are dry and arid and irrigation is necessary for the production of valuable crops thereon. The respective amounts of water hereinbefore stated to have been appropriated for or used on these lands, are in each instance as specified therefor necessary and sufficient for the reasonable and economical irrigation of crops thereon other than grain, potatoes, corn and beets. These do not need to be irrigated for so many months as alfalfa and pasture. Only two-thirds of the amount of water in acre feet hereinbefore specified or allowed for the irrigation of any of the above described tracts of land is necessary for, or should be or is allowed for the irrigation of grain grown thereon. Only four-fifths of the amount of water in acre feet designated above for the irrigation of said tracts of land is necessary for, or should be or is allowed for, the irrigation of potatoes, corn or beets grown thereon. Young alfalfa needs frequent irrigations for a long season. An additional amount of ten per cent of the quantity of water herein-

before specified in acre feet for the irrigation of any of the above described lands is necessary for and should be and is allowed for the irrigation thereof during the first year that alfalfa is sown thereon, whether the alfalfa be sown with or without grain.

The amounts of water which the parties to this action have appropriated and used for purposes other than the irrigation as stated above are necessary and sufficient for the uses for which they have been appropriated.

The above named parties who so appropriated water for irrigation have also used and in addition thereto are entitled and allowed to use water for livestock and domestic purposes, but only in such amounts as may be necessary for watering stock and for domestic purposes; provided that the priority in respect of the use of water for livestock and domestic purposes of any person shall be identical with the priority of such party for irrigation.

IT IS FURTHER ORDERED AND DECREED that that certain agreement known as the Truckee River Agreement, dated July 1, 1935, entered into by the United States of America, party of the first part, Truckee-Carson Irrigation District, party of the second part, Washoe County Water Conservation District, party of the third part, Sierra Pacific Power Company, party of the fourth part, and such other users of the waters of the Truckee River as may have or shall become parties to said agreement by signing their names thereto, parties of the fifth part, which agreement provides (among other things) for the upstream storage of the waters of the Truckee River and its tributaries, be and the same is hereby approved, adopted

by the Court and made a part of the decree and shall be binding as between the signatory parties to said agreement.

• • • • •

No owner or person or party entitled to the use of water under this decree shall be allowed use for irrigation during any calendar month more than twenty-five per cent of the quantity of direct water in acre feet hereby allowed for the land for the season.

If it shall appear at any time in regard to the actual use and need of water for irrigation that the amount hereinbefore estimated and allowed to be diverted from the river or stream into any ditch or canal is not sufficient after transportation loss to deliver to the land the flow allowed by this decree for application to the land, the allowance or flow as fixed by this decree for application to the land shall control, and there may, and hereby is allowed to be diverted from the stream a larger amount than the amount hereinbefore estimated for diversion from the stream, to the extent necessary to supply to the land, after actual transportation loss, the flow of water allowed by this decree for application to the land. Whether more or less than the amount hereinbefore estimated for diversion from the stream by any ditch, the quantity of water diverted for irrigation shall in every case be only such an amount as will supply to the land, after actual transportation loss, the amount of water allowed by this decree for application to the land and only the quantity needed for the irrigation thereof.

When any other user will thereby be deprived of any part of the water to which he is entitled, no ditch owner or user shall be allowed to divert away from the stream extra water for regulating the flow in any ditch.

The parties, persons, corporations, intervenors, grantees, successors in interest and substituted parties hereinbefore named, and their and each of their servants, agents, attorneys, assigns and all persons claiming by, through or under them and their successors, in or to the water rights or lands herein mentioned or described, are and each of them is hereby forever enjoined and restrained from asserting or claiming any rights in or to the waters of the Truckee River or its tributaries, or the waters of any of the creeks or streams or other waters hereinbefore mentioned except the rights, specified, determined and allowed by this decree, and each and all of said parties, persons, corporations, intervenors, agents, attorneys, servants, assigns and successors in interest; and all persons claiming by, through or under them, are hereby perpetually restrained and enjoined from diverting, taking or interfering in any way with the waters of the Truckee River or its tributaries or with waters of any of the creeks or streams, or with any of the other waters hereinbefore mentioned, so as to in any manner prevent or interfere with the diversion, use and enjoyment of the waters of any of the other persons or parties as allowed or adjudicated by this decree, having due regard to the relative priorities herein set forth; and each of the said parties and persons and each of their agents, servants, attorneys and employees is hereby enjoined and restrained from ever taking, diverting, using or claiming any of the water so decreed, in any manner or at

any time so as to in any way interfere with the prior rights of any other persons or parties having prior rights under this decree, as herein set forth, until such persons or parties having prior rights have received for their several uses the waters hereby allowed and adjudged to them.

Except as herein specially provided no diversion of water in any ditch or canal, in this decree mentioned shall be permitted except in such amount as shall be actually, reasonably necessary for the economical and beneficial use for which the right of diversion is determined and established by this decree. The amounts of water hereinbefore allowed are declared to be sufficient for the uses herein mentioned, and any and all use of water in excess of such decreed amounts is declared to be wasteful, and all wasteful or excessive use of water is hereby prohibited.

* * * * *

Whenever in this decree words of ownership are used in connection with any irrigated lands, such words shall not adjudicate, determine or affect any property rights therein, and this decree does not and shall not in any way determine the title to or rights in any property whatsoever, other than the rights to the diversion and use of water as herein determined and established. In the cases where, by this decree, water is allowed to be diverted through any ditch by the owner thereof for another party the conditions of any contractual relations existing between them are not hereby determined.

A Water Master shall be appointed by this Court to carry out and enforce the provisions of this decree and the instructions and orders of the Court, and if any proper

orders, rules or directions of such Water Master, made in accordance with and for the enforcement of this decree, are disobeyed or disregarded he is hereby empowered and authorized to cut off the water from the ditch or canal owners or water users so disobeying or disregarding such proper orders, rules or directions, and the Water Master shall promptly report to the Court his said action in such case and the circumstances connected therewith and leading thereto. Whenever the necessities of the situation appear to the Court to so require, the Court shall authorize the employment by the Water Master of such person or persons to assist the Water Master as the Court may deem necessary to properly carry out the provisions of this decree and the orders of the Court. The terms of employment, expenses and compensation of said Water Master and his assistants, the payment thereof and the means and methods for securing funds with which to pay the same, shall be fixed by orders which the Court may hereafter from time to time make. The compensation and expenses of the Water Master and his assistants shall be borne by the parties whose rights are adjudicated by this decree in the following manner, to-wit: One-third by the United States, one-third by the Sierra Pacific Power Company, and the remaining one-third by the remaining persons or corporations whose rights are adjudicated by this decree. Any person feeling aggrieved by any action or order of the Water Master may in writing and under oath complain to the Court, after service of a copy of such complaint on the Water Master, and the Court shall promptly review such action or order and make such order as may be proper in the premises.

The owner or owners of each ditch or canal herein authorized to divert water from the Truckee River or any of its tributaries, or from any ditch or canal or other waterway receiving water therefrom, shall, within sixty (60) days after the entry of this decree, or such lesser time as may be fixed by the Water Master, install and thereafter at all times properly maintain in such ditch, canal or other waterway, a reliable, sufficient and easily-operated regulating headgate and locking and measuring devices, to be approved by the Water Master, whereby the water diverted into such ditch, canal or other waterway at any and all times may be properly regulated and correctly measured.

The stored water of any reservoir, including Lake Tahoe, may be turned into and carried in the channel of any natural stream and mingled with the waters thereof and diverted therefrom for the proper uses of the persons or parties entitled thereto. The Water Master, upon timely notice, shall so regulate the headgates along the streams and do and direct to be done such other things as may be needful to transport such stored water and deliver the same to the person or persons entitled thereto. All persons are hereby prohibited from in any way interfering with any such stored water while the same is being legally carried to the persons or parties entitled thereto.

The quantities of water permissible to be diverted by the owners of the several ditches, through said ditches, on account of the several priorities herein decreed, are decreed subject to the obligations of said owners to divert and use water only at such times as needed and only in such amounts as may be required under a reasonable, eco-

nomical and beneficial use. Rotation, or the combining and exchanging of the use of water between ditches and among users shall be permitted when necessary in order to obtain reasonable economy in the use of the water of the river or other streams, or in order to give to each ditch or user a more advantageous irrigation head, provided that such rotations shall not injuriously affect any of the rights determined and allowed by this decree. The Water Master may arrange for such rotations and consult with and endeavor to obtain the agreements of the various water users thereto, as the occasion may require and shall promptly report to this Court his action in the premises.

All users of water allowed by this decree a flow of less than one inch per acre for his, her or their respective lands may, with the consent of the Water Master or by his direction to the owners or person in charge of the ditch through which the water is conveyed, use when needed for the irrigation of his, her or their land, a larger flow than specifically allowed by this decree, up to and not exceeding one inch per acre, provided the amount of water used during any calendar year shall not exceed the seasonal acre feet allowance for the land, and that the flow allowed would not, if continuous, deliver in any one month in excess of twenty-five (25) per cent of the seasonal allowance in acre feet heretofore in this decree specifically allowed for said lands.

Whenever any person or party shall not be receiving the amount of water to which he is entitled under this Decree, the Water Master shall, upon request open, close, lock and regulate the necessary headgates, ditches and other works

used for the diversion and application of such waters as to apportion the same as herein provided, and for that purpose may enter upon the lands of any and all persons having rights adjudicated by this Decree.

Persons whose rights are adjudicated hereby, their successors or assigns, shall be entitled to change, in the manner provided by law the point of diversion and the place, means, manner or purpose of use of the waters to which they are so entitled or of any part thereof, so far as they may do so without injury to the rights of other persons whose rights are fixed by this decree.

The State of Nevada is not a party to this suit but the rights of the State to water through different ditches which divert from the Truckee River for the State and numerous parties to this action have been estimated for convenience and purposes of administration.

The several parties to this suit shall pay and bear their own costs.

Said Sierra Pacific Power Company is the identical party and corporation referred to herein and in the "Temporary Restraining Order" made and entered in said cause on February 13, 1926, as the "Truckee River General Electric Company, a corporation", the name of said corporation having been heretofore changed, pursuant to law, from the Truckee River General Electric Company to Sierra Pacific Power Company.

The foregoing adjudications set forth in Claims Numbers 1 to 744, inclusive, of this Decree are based upon conditions existing at or prior to the entry of said Temporary Re-

straining Order herein on February 13, 1926; and such adjudication shall not be deemed to limit, reestablish, or otherwise affect any rights acquired, created or lost subsequently thereto by conveyance, transfer, abandonment, non-user, contract (including said Truckee River Agreement) or otherwise, but the rights of the United States shall be as herein adjudicated as of the date of this decree save only as the same may be affected by said Truckee River Agreement.

Done in open court this 8th day of September, 1944.

FRANK H. NORCROSS,
District Judge.

Office - Supreme Court, U.S.
FILED
AUG 11 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 81-2245 and 81-2276

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF NEVADA, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

TRUCKEE-CARSON IRRIGATION DISTRICT, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a 1944 final decree, confirming in the United States certain water rights for the separate purposes of benefitting both the Pyramid Lake Indian Reservation and the Newlands Reclamation Project, permits additional water-right claims for the Reservation to be litigated in a later case against, and satisfied at the expense of, only those water rights previously decreed for the Project, when in the prior case the separate interests of the Project and the Reservation, both represented solely by the same attorneys for the United States, were not disclosed as mutually adverse to one another.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (81-2245 Pet. App. 197a-253a),[1] as amended by its order of July 10, 1981 (Pet. App. 254a-255a) is reported at 649 F.2d 1286. A further order (Pet. App. 256a-259a) amending the opinion of the court of appeals, issued on January 5, 1982, is

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[1] Hereinafter, all references to "Pet. App.", unless otherwise noted, are to the Appendix to the Petition for a Writ of Certiorari filed by the State of Nevada in No. 81-2245.

reported at 666 F.2d 351. The opinion (Pet. App. 161a-179a) and findings of fact and conclusions of law (Pet. App. 180a-192a) issued by the district court on December 8, 1977, are unreported. A prior opinion of the district court, rendered on February 5, 1975, is reported at 71 F.R.D. 10.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1981. The petition for rehearing was denied on March 11, 1982 (Pet. App. 260a-261a). Separate petitions for a writ of certiorari were filed by the State of Nevada (No. 81-2245) and by the Truckee-Carson Irrigation District (No. 81-2276) on June 7 and 9, 1982, respectively.[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. This suit was filed by the United States to quiet its title to a reserved water right, having priority as of the year 1859, for the maintenance and preservation of historic fisheries along the lower Truckee River and in Pyramid Lake in northwestern Nevada. The river's lower reaches, the lake, and the 475,000 acres adjoining them all comprise the Pyramid Lake Indian Reservation, which was established in 1859 and later confirmed in 1874 by Executive Order of the President (Pet. App. 182a, 199a). Today the Reservation is occupied by respondent Pyramid Lake Paiute Tribe of Indians, organized under a tribal constitution approved by the Secretary of the Interior pursuant to Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. 476 (Pet. App. 183a). The reserved water right is sought for the Tribe's benefit.

b. Pyramid Lake is the downstream terminus of the Truckee River, a navigable interstate stream. As de-

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[2] On July 9, 1982, the Pyramid Lake Paiute Tribe of Indians, a respondent to the petitions in Nos. 81-2245 and 81-2276, filed a conditional cross-petition for a writ of certiorari (No. 82-38).

scribed by this Court, "[t]he Truckee rises in the High Sierra, flows into Lake Tahoe, through which the California-Nevada boundary runs, exits on the California side of the Lake, and flows 20 miles before crossing into Nevada. It then continues another 65 miles, through Reno and beyond, to its termination in Pyramid Lake, a desert lake 20 miles long and five miles wide, with no outlet and a water level determined by the balance or imbalance between inflow and evaporation" (*United States* v. *State of Nevada*, 412 U.S. 534, 535-536 (1973)).[3] The water level of Pyramid Lake dropped some 40 feet between 1920 and 1938, reducing the surface area by about 20,000 acres, and by 1921 a delta had formed impeding the Truckee's flow into the lake, all to the detriment of the fishery that once flourished there (Pet. App. 204a-205a, 208a-209a). Providing the Tribe with access to this fishery was one purpose for establishing the Pyramid Lake Reservation originally, as the district court found below (*Id.* at 183a, 199a). Yet, since 1940, as the level of the lake continued to drop even further, one species of fish indigenous to the fishery has become extinct, another has been officially classified as "endangered," and still another as "threatened" under the Endangered Species Act of 1973, 16 U.S.C. (& Supp. IV) 1531 *et seq.* (Pet. App. 208a-209a).[4]

c. The fishery's decline stems from upstream diversions of Truckee waters, which have depleted the flow into Pyramid Lake. The largest such diversion, at Derby Dam, sends a substantial volume of Truckee waters (Pet. App. 205a) through the Truckee Canal, out of

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[3] Maps depicting the area in question are reproduced in *United States* v. *Alpine Land & Reservoir Co.*, 431 F.2d 763, 765 (9th Cir. 1970), and as an appendix to the United States' Motion for Leave to File Complaint in *United States* v. *Nevada*, No. 59 Original, 1972 Term.

[4] The Secretary of the Interior has listed the cui-ui (*Chasmistes cujus*) as "endangered" and the Lahontan cutthroat trout (*Salmo clarki henshawi*) as "threatened." 50 C.F.R. 17.11, at 74-75.

the Truckee watershed to Lahontan Reservoir on the Carson River. From there, the water is distributed for irrigation and related uses on private lands within the Newlands Reclamation Project.[5] Derby Dam, Truckee Canal, and Lahontan Reservoir were all constructed by the United States as part of the Newlands Reclamation Project (*id.* at 184a), one of the first undertaken after passage of the Reclamation Act of 1902, ch. 1093, 32 Stat. 388 *et seq.*, 43 U.S.C. 371 *et seq.* Since 1926, the Project has been operated and managed by petitioner Truckee-Carson Irrigation District ("TCID"), subject to the terms of a contract with the United States (Pet. App. 186a).[6]

2. Diversions at Derby Dam for the Newlands Reclamation Project were based on claims made by the United States, pursuant to Nevada state law and as authorized by Section 8 of the Reclamation Act of 1902, 43 U.S.C. 372, for appropriative rights to Truckee waters with a 1902 priority date (Pet. App. 200a). However, in order

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[5] Certain distributions for part of the lands on the Newlands Project's Truckee Division are made by direct diversion from the Truckee Canal before it empties into Lahontan Reservoir.

[6] In 1974, the Secretary of the Interior notified TCID that he would terminate the 1926 contract permitting operation of the project by TCID. Before the contract's termination could take effect, TCID sued the Secretary in the United States District Court for the District of Nevada to prevent the termination. This suit was tried in October 1979, but has not yet been decided. *Truckee-Carson Irrigation District* v. *Secretary of the Interior*, Civil No. R-74-34 BRT (D. Nev.).

The Secretary's 1974 termination notice was issued because TCID resisted the Secretary's enforcement of new operating criteria for the Project (38 Fed. Reg. 6697 (1973)) mandated by an order of the United States District Court for the District of Columbia in *Pyramid Lake Paiute Tribe* v. *Morton*, 354 F. Supp. 252, 262-266 (1973), a case to which TCID was not party. The disputed operating criteria supplemented earlier general operating criteria adopted by the Secretary in 1967 to govern the exercise by the United States of its water rights on the Truckee and Carson Rivers in such a manner as to make as much Truckee River water available to Pyramid Lake as possible. See 43 C.F.R. 418.3(a).

to resolve these claims and claims on behalf of Indians on the Pyramid Lake Reservation for water to irrigate lands thereon, as against competing water-right claims by non-federal parties along the Truckee and its tributaries, the United States in 1913 commenced a quiet title suit, *United States* v. *Orr Water Ditch Co.*, Equity No. A-3, in the United States District Court for the District of Nevada (Pet. App. 1a-11a; 184a-185a). All Truckee water users in Nevada were joined as defendants (*id.* at 201a).

After trial and receipt of the special master's report, the district court issued a temporary restraining order in 1926 (Pet. App. 12a-16a) to govern the parties' use of Truckee waters until entry of a final decree (*id.* at 185a-186a, 204a). The final decree in *Orr Ditch* was entered on September 8, 1944 (Pet. App. 17a-150a). Neither the petitioners herein, Nevada and TCID, nor the respondent Tribe was named as a party in the *Orr Ditch* case (Pet. App. 149a; 186a; 242a), although the court's final decree did adopt (*id.* at 143a-144a) the terms of the Truckee River Agreement of July 1, 1935 (81-2276 Pet. App. A110-A184) to which representatives of TCID, the United States, and others were signatory. No member or official of the Tribe signed this Agreement, but Article XI thereof (81-2276 Pet. App. A158-A160) stipulated to a reserved water right for irrigating the Pyramid Lake Reservation in the amounts ultimately awarded by the *Orr Ditch* decree. The decree itself confirmed water rights for both the Reservation and the Newlands Project only in the name of the United States (Pet. App. 56a-59a, 245a).

For irrigation on the Reservation, *Orr Ditch* generally decreed a reserved water right, with a priority date of December 8, 1859, to divert 4.71 acre feet of Truckee water per irrigated acre each calendar year for the irrigation of 3,130 acres of reservation bottom lands, and 5.59 acre feet per irrigated acre each calender year for the irrigation of 2,745 acres of reservation bench (or river terrace) lands (Pet. App. 57a-58a, 187a). No reserved rights for sustenance of the Pyramid Lake fishery or for

other purposes were claimed or decreed for the Reservation. The district court later found that there was "no evidence * * * that a *Winters*[7] implied and reserved water right for fishery purposes was actually ever litigated in the course of the *Orr Ditch* proceedings" (*id.* at 189a).

For the Newlands Project, *Orr Ditch* decreed generally (Pet. App. 58a-59a) a right with a 1902 priority date to divert Truckee waters at Derby Dam at the rate of 1,500 cubic feet per second for irrigation of 232,800 project acres, for storage at Lahontan Reservoir, for power generation, and for other municipal and domestic purposes. This diversion is subject to "such control, disposition and regulation as the plaintiff [United States] may make or desire, provided that the amount of this water allowed or used for irrigation shall not exceed, after transportation loss and when applied to the land, 3.5 acre feet per acre for the [project] bottom lands, nor 4.5 acre feet per acre for the [project] bench lands * * *" (*id.* at 59a).

3. After entry of the *Orr Ditch* decree, the continued decline of the Pyramid Lake fishery provoked concern by the public, the Tribe, and the federal and state governments (Pet. App. 190a-191a, 208a-210a, 246a, 256a-257a).[8] Ultimately, in September 1972, the United States

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[7] See *Winters* v. *United States*, 207 U.S. 564 (1908).

[8] Activities undertaken since 1950 concerning the fishery include:

(1) Congress, in Section 4 of the Washoe Project Act of 1956, Pub. L. No. 858, 70 Stat. 777, directed that facilities at Lake Tahoe provide for increased water releases and restoration of the fishery. The House Report stressed that the fishery's restoration "to its full potential value is deemed to be of national interest and importance." H.R. Rep. No. 2055, 84th Cong., 2d Sess. 4-5 (1956).

(2) On February 21, 1967, the Secretary of the Interior adopted general operating criteria to govern the exercise of federal water rights in the Truckee and Carson River systems. 32 Fed. Reg. 3098; 43 C.F.R. Part 418. One objective of these criteria was to maximize the use of Carson River waters to meet water requirements on the Newlands Project and to conserve Truckee flows so as to make as much water available to Pyramid Lake as possible. 43 C.F.R.

applied for leave of this Court to file a complaint seeking, *inter alia*, declaration and quantification of a reserved right to Truckee River waters for a fishery on the lower

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418.3(a). At the suit of the Tribe, the United States District Court for the District of Columbia in 1973 ordered the Secretary to strengthen these regulations in specific ways to maximize the availability of water for the Pyramid Lake fishery for the benefit of the Tribe. *Pyramid Lake Paiute Tribe* v. *Morton*, *supra*, 354 F. Supp. at 262-266; 38 Fed. Reg. 6697 (1973). This district court order remains outstanding, and the district court retains jurisdiction to enforce it. As explained above (see note 6, *supra*), the Secretary sought to cancel the contract with TCID when it resisted compliance with the new operating criteria, but TCID sued to prevent the cancellation.

(3) In 1968, the Tribe unsuccessfully sought to intervene in the ongoing general adjudication of rights to Carson River waters, which also flow into Lahontan Reservoir for distribution to lands on the Newlands Project. The Tribe claimed that the Secretary's 1967 operating criteria (43 C.F.R. Part 418) "unitized" the operation of the Truckee and Carson Rivers and that tribal intervention therefore was justified to minimize diversions from the Truckee for the Project. Intervention was denied. *See United States* v. *Alpine Land & Reservoir Co.*, 431 F.2d 763 (9th Cir. 1970), cert. denied, 401 U.S. 909 (1971). Subsequently, water rights in the Carson River were adjudicated by final decree entered in *United States* v. *Alpine Land & Reservoir Co.*, 503 F. Supp. 877 (D. Nev. 1980), appeal pending, Nos. 81-4084 and 81-4116 (9th Cir. argued May 14, 1982).

(4) In December 1971, the Pyramid Lake Task Force issued its Final Report, recommending (at 38) resolution of the Tribe's claims to Truckee waters for the preservation of Pyramid Lake. The Final Report noted that the Task Force's Water Rights Study Group had suggested that the Tribe or the United States commence a lawsuit to ascertain the Tribe's water rights (*ibid.*). The Task Force itself, a joint federal-state undertaking, had been created as the result of a July 1969 meeting between Governors Reagan of California and Laxalt of Nevada and Secretary of the Interior Hickel (*id.* at v).

(5) In 1975, the Tribe and the United States settled a tribal claim brought in 1951, pursuant to the Indian Claims Commission Act of 1946, 25 U.S.C. (& Supp. IV) 70 *et seq.*, for damages to the Pyramid Lake fishery as the result of not receiving "all the water to which [the Tribe] * * * was entitled under rights reserved for it" when the Reservation was established. *Pyramid Lake Paiute Tribe* v. *United States*, 36 Ind. Cl. Comm. 256, 259 (1975). The parties

Truckee and in Pyramid Lake. *United States* v. *State of Nevada*, No. 59 Original. This Court denied leave to file the complaint, declining to exercise its original but nonexclusive jurisdiction under 28 U.S.C. 1251(b)(2) because concurrent jurisdiction over the controversy existed in the United States District Court for the District of Nevada. *United States* v. *Nevada*, 412 U.S. 534 (1973).

4. The instant case then was commenced by the United States in the United States District Court for the District of Nevada in December 1973. Joined as defendants were approximately 17,000 persons whose rights stemmed from the *Orr Ditch* decree, as well as petitioners Nevada [9] and

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stipulated that this $8 million settlement did not represent "damages or compensation for the loss, diminution or taking of any such reserved water rights" (*id.* at 259-260). The Tribe covenanted that, if it should "finally be judicially determined that, by reason of acts or omissions of the United States done or occurring prior to the date of execution hereof," such reserved water rights "were lost, taken, subordinated to other rights, or otherwise diminished," it would not again sue the United States for additional damages or compensation (*id.* at 261). This covenant not to sue, however, did not extend to post-settlement acts or omissions by the government (*ibid.*)

(6) The Secretary has sought to operate the Stampede Dam on a tributary of the Truckee River in a way that maximizes water use for preservation of the Pyramid Lake fishery, but that operation has been challenged by parties seeking to require the use of the water for municipal and industrial uses. See *Carson-Truckee Water Conservancy District* v. *Watt*, 537 F. Supp. 106 (D. Nev. 1982). The district court has ruled on certain threshold matters, but has not yet determined the effects of the Tribe's water rights on operation of the Dam. *Id.* at 112.

(7) Efforts have been pursued to reach a comprehensive resolution of the various disputes and lawsuits, including the instant case, affecting the competing demands for water in the Truckee and Carson watersheds in a way that would free up more water for the Pyramid Lake fishery while still providing for an adequate supply of water for other uses. See, *e.g.*, 128 Cong. Rec. S4826 (daily ed. May 11, 1982).

[9] The United States named petitioner Nevada as a defendant in its proprietary capacity, in its governmental capacity as issuer of water-appropriation permits, and as parens patriae for its citizens (Pet. App. 211a). On April 29, 1975, the district court granted

TCID. The Tribe later intervened as a co-plaintiff. The government's complaint claimed a reserved water right, with a November 29, 1859 priority date, for maintenance of Pyramid Lake and the lower Truckee River for a fishery and other purposes beneficial to the Tribe and sought quantification of this right (Pet. App. 159a).[10] Petitioners and other defendants asserted that the fishery water-right claim was barred by res judicata and collateral estoppel by virtue of the final decree in *Orr Ditch*. In February 1975, the district court bifurcated the trial in order to try these affirmative defenses first (71 F.R.D. at 12-13).[11]

On December 8, 1977, the district court dismissed with prejudice the Tribe's complaint in intervention and dismissed with prejudice the government's action to the extent it sought a reserved right for the tribal fishery (Pet.

Nevada's motion that the suit be dismissed against it in its capacity as parens patriae for its citizens. Accordingly, we question the recital in Nevada's petition that it is appearing in this Court "in its quasi-sovereign capacity" on behalf of all the people and entities of the State. Nevada's petition does not seek review on any other matters such as those pertaining to any state proprietary right or state governmental power.

[10] The complaint also asserted, *inter alia*, federally reserved water rights for the Stillwater National Wildlife Refuge, with a 1948 priority date, and for Toyaibe National Forest, with priority dates of 1905, 1909, and 1926 (Pet. App. 155a-156a, 159a-160a; 211a). These additional claims were not addressed by the district court in its later dismissal of the Tribe's complaint in intervention and of so much of the government's complaint as sought "a Winters reserved water right for the Pyramid Lake Tribe of Indians for fishery purposes" (Pet. App. 195a-196a). These additional claims likewise were not addressed by the district court's opinion (Pet. App. 161a) and findings and conclusions (Pet. App. 180a-192a).

[11] At the same time, the district court joined approximately 3,800 recipients of Newlands Project water who held water right certificates or other contracts with the United States or TCID entitling them to Project water. The court certified these 3,800 defendants as a class pursuant to Fed. R. Civ. P. 23 and designated TCID as the representative of the class. 71 F.R.D. at 13-18.

App. 195a-196a). The court held that, because no reserved water right for the fishery was "actually ever litigated" in *Orr Ditch* (Pet. App. 189a), the fishery claims of the United States and Tribe were not barred by the doctrine of collateral estoppel (*id.* at 192a). But the court concluded that the doctrine of res judicata did bar these claims (*ibid.*) because, in its view, the claim for a reserved water right for irrigation purposes asserted by the United States for the Tribe in *Orr Ditch* was the "same quiet title cause of action" now asserted (*id.* at 188a) and because the United States, and the Tribe in privity with it, each had a "full and fair" opportunity in *Orr Ditch* to present and litigate the fishery claim (Pet. App. 186a, 188a). The district court certified its dismissal of the Tribe's complaint as final under Fed. R. Civ. P. 54(b) and its partial dismissal of the United States' action under 28 U.S.C. 1292(b), staying further proceedings pending appeal (Pet. App. 195a-196a). The Tribe appealed and the United States was granted leave to take an interlocutory appeal.[12]

5. The court of appeals affirmed in part, reversed in part, and remanded for further proceedings. 649 F.2d at 1313. The court held that the preclusive effect of the *Orr*

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[12] The district court also held, as an additional ground for its dismissals, that the reserved water right for the Reservation's fishery had been "extinguished" or "taken" by the United States some time before 1934 when "the executive or administrative decision not to assert a fishery right [in *Orr Ditch*] had already been made" (Pet. App. 179a). The court held that federal authority to "extinguish" or "take" this reserved right was granted by Sections 7 and 10 of the Reclamation Act of 1902, 43 U.S.C. 421 and 373, and by Section 26 of the Appropriations Act of 1904, ch. 1402, 33 Stat. 225, providing for the irrigation of lands on the Pyramid Lake Reservation (Pet. App. 166a-167a, 189a-190a). The Ninth Circuit's reversal expressly held that the reserved fishery right, if it ever existed, was not "taken" or "extinguished" by the United States; that the 1902 Reclamation Act never authorized this to be done; and that, to the extent that the 1904 Appropriations Act may have done so, it was never implemented (Pet. App. 214a-222a). Neither petition seeks review of this aspect of the decision below.

Ditch decree barred the United States and the Tribe from seeking a water right for the Reservation's fishery which would impair or affect the decreed rights of any *Orr Ditch* defendant or his successor and the rights of any subsequent water appropriator who "reasonably relied on the decree" (Pet. App. 248a; see also *id.* at 224a-225a). In the court's view, the fishery claim could not be litigated against these parties because of the bar of "res judicata (or 'claim preclusion')" produced by the *Orr Ditch* decree, a bar which "applies not only to matters that were actually litigated but also to all claims that might have been litigated" in the earlier case (Pet. App. 226a n.11). Thus, the dismissal of the fishery claim was allowed to stand as against these defendants and junior appropriators (Pet. App. 239a-240a).[13]

However, the court held that the decree in *Orr Ditch* adjudicating the rights among the United States and other water users did not prevent the modification or adjustment of the water rights decreed in the name of the United States, as between the respective uses for the Pyramid Lake Reservation and the Newlands Project. The court of appeals explained that neither the United States, the Tribe, nor TCID filed any pleadings in *Orr Ditch* stating that the respective rights to be decreed to the United States for the Reservation and for the Newlands Project "would bind the Reservation and the Project *inter se*" (Pet. App. 243a). "As a general matter," the court reasoned, relying on Comment a to Section 82 of the *Restatement (Second) of the Law of Judgments* (Tent. Draft No. 2, 1975) and on Section 82 of the *Restatement (First) of the Law of Judgments* (1942), "a

[13] The affirmance of the dismissal in this regard also was intended to maintain intact those water rights of TCID or its members derived "from any of the named defendants in *Orr Ditch*, or from subsequent appropriations not adjudicated in *Orr Ditch*" (Pet. App. 241a n.19). Only those rights of TCID and its members that are derived from rights decreed to the United States in *Orr Ditch* for use on the Newlands Project might be affected by the partial reopening of *Orr Ditch* permitted by the court of appeals.

judgment does not conclude parties who were not adversaries under the pleadings" except "only as to issues actually or necessarily litigated" (Pet. App. 240a-241a). Because there was no "adversity under the pleadings between these two interests" advanced by the United States and because, as the district court found, no fishery claim was actually litigated in *Orr Ditch*, the court of appeals was constrained to reverse the dismissal as to TCID (Pet. App. 245a). The court noted that it "might be persuaded to relax the adversity requirement" as between co-parties so as to "fit the realities of water adjudication" (*id.* at 241a). However, in *Orr Ditch*, the Tribe and TCID were not co-parties, but "nonparties who were represented simultaneously by the same government attorneys" (*id.* at 242a). In the court's view, this circumstance made the requirement that "adversity be established by pleadings * * * particularly compelling" (*id.* at 243a). Otherwise it would be necessary to assume that the United States "not only represented dual interests on the same side of a dispute, but that the government simultaneously, with the same lawyers, represented those dual interests in a dispute between themselves" (*id.* at 242a). But, the court continued, "[t]his posture is completely alien to our adversary system and will not be inferred from ambiguous facts. Before we conclude that government officials have undertaken such representation in litigation, we must be faced with a pleading in which this posture is clearly assumed" (Pet. App. 242a-243a).

The court therefore remanded for further proceedings, only as between the respective water rights previously decreed to the United States, on matters relating to the existence and extent of any reserved water right to maintain the Pyramid Lake fishery. In doing so, the court stressed the limited nature of its holding (Pet. App. 248a-249a):

> On remand the district court must determine whether the Tribe is entitled to a water right for its fishery. We express no opinion on that question. If

the Tribe is adjudged to have such a right, it is of course limited to a quantity of water "necessary to fulfill the purposes of the reservation, no more." *Cappaert* v. *United States*, *supra*, 426 U.S. [128] at 141, 96 S.Ct. [2062] at 2071 [(1976)]. And, of course, any additional rights due the Tribe must come from water rights decreed to the government in *Orr Ditch*. Neither the Tribe nor the government may expand its water rights beyond the limits of government rights decreed in the original proceeding.

ARGUMENT

The decision of the court of appeals in the unique circumstances of this case is correct and does not conflict with any decision of this Court or of any other court of appeals. The ruling also is interlocutory in nature. There has not yet been a determination by the court of appeals that water was reserved to maintain the Pyramid Lake fishery when the Reservation was established for the benefit of the Tribe or, if such a reserved water right does exist, that a specified quantity of water would be required to satisfy it. These matters were left to the district court on remand. Thus, the practical impact, if any, of the decision is speculative at the present time. If the district court finds a reserved water right for fishery purposes, if the court of appeals affirms that holding, and if it appears at that time that the quantity of water determined to be necessary to satisfy that right will have a substantially adverse effect on the Newlands Project, there will be time enough for this Court to grant review, assuming the issue otherwise merits review.

There is, moreover, considerable doubt about the degree to which the Newlands Project would be affected even if a reserved water right ultimately is recognized for the Pyramid Lake fishery in the course of further proceedings. We do not disparage the importance of water to all users in northwest Nevada, Indian and non-Indian, nor the desirability of quieting the unsettled situation now prevailing. But the instant suit is but one aspect

of a multifaceted endeavor to conserve water in the Truckee and Carson watersheds and to secure additional water for Pyramid Lake. It is possible that those several measures will free up sufficient water to satisfy much, perhaps all, of whatever reserved water right would be recognized and in any event render the issue of whether the Tribe actually has the benefit of a *reserved* right for this purpose of little moment. By the same token, the pendency of a number of other cases and disputes regarding the operation of federal works on the Truckee and Carson river systems and diversions from those systems amply demonstrates that a decision by this Court on the res judicata issue presented by petitioners would not terminate the broader controversy regarding the conservation and allocation of water among competing uses in northwest Nevada. A comprehensive resolution of these matters eventually will be necessary.

It also must be stressed that the court of appeals did not fashion a significant exception to the doctrine of res judicata, either in civil litigation generally or in water adjudications in particular. To the contrary, the court upheld the application of res judicata to claims against *all* defendants in *Orr Ditch*, their successors in interest, and subsequent appropriators who relied on the decree. It thus did not permit a reopening of the *Orr Ditch* decree to enable the United States to acquire additional water at the expense of other parties to that case. The court simply permitted a reexamination of the allocation of water as between the several uses for which the United States itself claimed water in *Orr Ditch*. And the court did so by applying established res judicata principles in circumstances in which water decreed for the two federal purposes is used not by the United States itself, but by others who were not parties to the litigation that is sought to be given preclusive effect and whose interests therein were not adversely presented. Finally, it should be clear that the res judicata decision in this case will have virtually no precedential impact as a practical mat-

ter, because in no other case to our knowledge has the United States acted with regard to Indian interests as it did in the *Orr Ditch* proceedings. In pending water adjudications involving Indian interests, the affected tribe typically intervenes in its own name, or participates actively in the formulation of the government's case on its behalf, so that the situation presented by this case cannot be expected to recur.

For these reasons, the court's resolution of the res judicata issue in the unique circumstances presented here does not warrant further review, especially in the current interlocutory posture of the case.

1. Review of the narrow res judicata issue presented plainly would be premature at this time. As noted above, the case is in an interlocutory posture, with all substantive issues relating to the existence and extent of a reserved water right to maintain the Pyramid Lake fishery still to be resolved on remand. The court of appeals' partial reversal of the district court's dismissal of the fishery claim on res judicata grounds therefore leaves TCID in precisely the position in which it would have been if the district court itself had rejected TCID's res judicata defense, thereby requiring a trial on the merits of the claim. If the courts below reject that claim on the merits, the matter of the correctness of the court of appeals' res judicata ruling will be rendered moot. If the courts below sustain the fishery claim, review may be sought of the res judicata issue after appeal from a final judgment. Nothing in the facts of this case suggests that the Court should depart from its usual practice and grant review at this stage. Instead, the circumstances weigh decidedly against doing so.

a. First, the practical impact of the court of appeals' ruling is uncertain even if it is assumed that the district court ultimately will conclude on remand that a water right to maintain the Pyramid Lake fishery was reserved when the Reservation was established. The amount of any such right still must be quantified, which alone ren-

ders speculative the extent to which water users on the Newlands Project would be affected. But beyond this, a decision in other pending cases concerning the use of water in the Truckee and Carson Rivers or other measures to conserve water may result in the freeing up of substantial amounts of additional water to flow into Pyramid Lake. This water would be available to satisfy much, perhaps all, of whatever reserved water right might be found for fishery purposes on remand in the instant case, thereby preventing impairment of the derivative rights of Newlands Project water users to receive a portion of the water appropriated by the United States for the Project and decreed to it in *Orr Ditch* for that purpose.

For example, the final decree of the district court in the general adjudication of rights to the waters of the Carson River[14] is now pending on appeal to the Ninth Circuit, where it was argued and submitted on May 14, 1982. *United States* v. *Alpine Land & Reservoir Co.*, *supra*. The magnitude of the annual water duty (*i.e.*, the total annual per-acre amount of water needed to grow crops) decreed by the district court in *Alpine* for delivery to irrigators on the Newlands Project was 3.5 acre-feet per acre for project bottom lands, and 4.5 acre-feet per acre for project bench lands. *United States* v. *Alpine Land & Reservoir Co.*, *supra*, 503 F. Supp. at 888. On appeal, the United States is claiming that at least 42,447 project acres are entitled to an annual water duty of only 3 acre-feet per acre, a substantial reduction. As to the applicable water duty for the approximately 32,400 Project acres remaining, the United States seeks a remand for precise findings on trial evidence and, if necessary, for reception of additional evidence. In addition, the United States and TCID both seek to set aside a minimum 30,000 acre-foot pool at Lahontan Reservoir that the district court decreed for recreational purposes.

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[14] *Orr Ditch*, of course, adjudicated rights only to waters of the Truckee River.

Thus, the outcome of the pending appeal from the Carson River decree could substantially expand the availability of Truckee River waters to flow into Pyramid Lake, since less water would have to be diverted from the Truckee into Lahonton Reservoir where, together with Carson River waters, it is distributed to water users on the Project.

Conservation of water in the area, with a resulting increase in the flow of water into Pyramid Lake, also may result from the resolution of the pending suit brought by petitioner TCID in the district court in Nevada challenging the Secretary's proposed termination of the contract under which TCID operates the Newlands Project works pursuant to rules and regulations issued by the Secretary. *TCID* v. *Secretary of the Interior*, *supra*, note 6. The Secretary's proposed cancellation of the contract was occasioned by TCID's resistance to new operating criteria for the Project designed to ensure an economical delivery and application of water. *Ibid.* Similarly, the United States District Court for the District of Columbia also retains jurisdiction to enforce what it found to be the Secretary's trust obligation to operate the Newlands Project in a way that maximizes the availability of water for Pyramid Lake. *Pyramid Lake Paiute Tribe* v. *Morton*, 354 F. Supp. 252 (1973); see notes 6 and 8, *supra*. Yet another possible source for partial satisfaction of any reserved right that may be recognized for the Pyramid Lake fishery is from releases at the Stampede Dam and Reservoir, a part of the Washoe Project on the upper Truckee. This, too, is the subject of pending litigation in the district court below. *Carson-Truckee Water Conservancy District* v. *Watt*, 537 F. Supp. 106 (D. Nev. 1982); see note 8, *supra*.

In addition to these other pending cases, but perhaps spurred by them, proposals have been advanced for the improvement of irrigation works on the Newlands Project, one of the oldest reclamation projects undertaken pursuant to the 1902 *Reclamation* Act, to prevent the unnecessary

loss of water in distribution. See, *e.g.*, 128 Cong. Rec. S4826 (daily ed. May 11, 1982). There have been suggestions that this refurbishing could be accomplished as part of a comprehensive resolution of the overall controversy concerning the use and allocation of waters of the Truckee and Carson Rivers in a way that would furnish additional water for the Pyramid Lake fishery while ensuring adequate supplies for the Newlands Project and other demands. *Ibid.* With the outcome of these related lawsuits and proposals still unclear, review at the present time is unwarranted.

b. Second, and as a necessary corollary to the foregoing discussion, a grant of certiorari by the Court at this time would not serve to conclude the broader controversy reflected in these other lawsuits and disputes. If the Court affirmed the Ninth Circuit's holding that assertion of a reserved water right for fishery purposes against the Project rights decreed to the United States in *Orr Ditch* is not barred by res judicata, then all that would be accomplished would be delay of the ultimate determination of whether a water right was in fact reserved for fishery purposes. And even if the Court were to reverse the Ninth Circuit's holding, the other pending cases discussed above, which might likewise reduce the availability of water to the Newlands Project or other users, would remain to be decided. In these uncertain circumstances, review by this Court of but one aspect of the broader problem is unwarranted.

2. a. In any event, the court of appeals correctly concluded that, in the unique circumstances of this case, the doctrine of res judicata did not wholly bar the assertion of a claim to a reserved water right for the Pyramid Lake fishery. Contrary to petitioners' contention, the court of appeals did not carve out a broad exception to the doctrine of res judicata, either in civil cases generally or in water adjudications in particular. The court of appeals in fact invoked that doctrine to bar the litigation of the fishery claim against *all* of the defendants sued by

the United States in *Orr Ditch* and their successors in interest and all persons who appropriated Truckee River water after the final decree was entered in *Orr Ditch* in 1944 in reasonable reliance upon that decree (Pet. App. 238a-240a).[15]

The court of appeals held only that the decree in *Orr Ditch* adjudicating water rights in the Truckee River as between the United States and the defendants in that case did not prevent adjustment, as between the respective uses for the Pyramid Lake Reservation and the Newlands Project, of the rights to water that were decreed to the United States alone in *Orr Ditch*. Thus, the court stressed that if the district court should conclude on remand that a water right was reserved to maintain the Pyramid Lake fishery when the Reservation was established, "any additional rights due the Tribe must come from water rights decreed to the government in *Orr Ditch*. Neither the Tribe nor the government may expand its water rights beyond the limits of government rights decreed in the original proceeding" (Pet. App. 248a-249a).

The basis of the court's ruling permitting consideration of the fishery claim to this extent was the established

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[15] Petitioner TCID also repeatedly refers to the related doctrine of collateral estoppel in arguing that assertion of the fishery claim is barred by the *Orr Ditch* decree. However, as the passage it quotes (81-2276 Pet. 9) from this Court's decision in *Montana* v. *United States*, 440 U.S. 147, 153 (1979), makes clear, the doctrine of collateral estoppel applies only to an issue that was "actually and necessarily determined" in the prior litigation. See also *Kremer* v. *Chemical Construction Corp.*, No. 80-6045 (May 17, 1982), slip op. 5 n.6. In this case, the district court found no evidence that a reserved water right for fishery purposes was actually ever litigated in the course of the *Orr Ditch* proceedings (Pet. App. 189a), and it accordingly rejected the collateral estoppel defense (*id.* at 192a). The court of appeals sustained the district court's finding that the existence of a water right for fishery purposes was not litigated in *Orr Ditch* (*id.* at 245a), and there has been no showing by petitioners to the contrary. Accordingly, TCID's collateral estoppel argument must fail. Further review of the collateral estoppel issue therefore is unnecessary.

rule that res judicata bars subsequent litigation as between co-parties only if they were formally adversaries under the pleadings in the original proceeding, by cross-claim or otherwise (Pet. App. 240a-241a). See *Restatement (Second) of the Law of Judgments* § 37 comment a, at 376 (1982);[16] 1B *Moore's Federal Practice* ¶ 0.411[2] (1982). In *Orr Ditch*, the United States advanced distinct claims to water for the Pyramid Lake Reservation and the Newlands Project. Moreover, these claims were advanced not for the federal government's own use, as in the case of a military reservation, national park, or national forest, but on behalf of and for the ultimate benefit of the Tribe and the water users on the Newlands Project, respectively.

These distinct interests asserted by the United States as plaintiff in *Orr Ditch* were aligned against claims by all other users of Truckee River water who were named as defendants; but the interests advanced on behalf of the Tribe and the Newlands Project water users in *Orr Ditch* were not represented as being adverse to one another. In this sense, the Reservation interests and Newlands Project interests were effectively co-plaintiffs in *Orr Ditch*, albeit formally represented by the United States. Accordingly, under res judicata principles applicable to co-parties who were not formally adversaries under the pleadings, the final decree in *Orr Ditch* recognizing rights in the United States for these two interests as against the named defendants asserting a right to the use of Truckee River water does not bar a subsequent adjudication as between the Reservation and Newlands Project interests advanced by the United States as plaintiff in *Orr Ditch*.

There is, of course, an exception to the principle regarding adversaries under the pleadings: as the court

[16] The comment to Section 37 of the *Restatement (Second) of the Law of Judgments*, *supra*, observes, for example, that in the absence of cross-claims or other similar pleadings between co-parties, "the possibility of merger and bar [*i.e.*, res judicata] by definition does not arise."

of appeals recognized (Pet. App. 241a), even where coparties are not formally adverse to one another, they will ordinarily be bound as to matters actually litigated. *Restatement (Second) of the Law of Judgments* § 37 (1982); 1B *Moore's Federal Practice* ¶ 0.411[2] (1982). But as the courts below held, the issue of the existence of a reserved water right for fishery purposes was not litigated in *Orr Ditch* and therefore is not foreclosed here.

b. The court of appeals stressed that its holding on the res judicata issue was narrow. Thus, the court indicated that although res judicata ordinarily applies only as between parties who were formally adversaries under the pleadings in the first proceeding, it might be persuaded to relax that requirement as between the parties in water adjudications, in view of the special nature of such proceedings (Pet. App. 240a-241a).[17] The result of this relaxation would be that all parties to the water adjudication would be bound even if each party did not formally file separate cross-claims against every other party in the lawsuit. Accordingly, petitioners are simply wrong in contending (81-2245 Pet. 11-12; 81-2276 Pet. 12-13, 22-24) that the court of appeals has engrafted onto water adjudications an outdated or unsuited rule of adversity of parties on the pleadings as a condition of giving res judicata effect to the decree in such adjudications. The court did not finally decide that issue, but to the extent it intimated a view on the matter, it in fact *agreed* with petitioners that such a requirement should not be imposed in water adjudications.

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[17] The court explained (Pet. App. 241a; citations omitted):

> A strict adversity requirement does not necessarily fit the realities of water adjudications. All parties' water rights are interdependent. Stability in water rights therefore requires that all parties be bound in all combinations. Further, in many water adjudications there is no actual controversy between the parties; the proceedings may serve primarily an administrative purpose. Were we concerned only with parties or coparties, we might be persuaded to relax the adversity requirement.

The court adhered to the established adverseness requirement in this case only in recognition of the fact that the Tribe and TCID (representing Newlands Project water users), whose interests are at stake here, were not co-parties in *Orr Ditch*, but "non-parties who were represented simultaneously by the same government attorneys" (Pet. App. 242a). To attach res judicata effect to the decree as between the Tribe and TCID in these circumstances would, the court reasoned, assume that the United States "not only represented dual interests on the same side of a dispute, but that the government simultaneouly, with the same lawyers, represented those dual interests in a dispute between themselves" (*ibid.*). But, the court continued, "[t]his posture is completely alien to our adversary system and will not be inferred from ambiguous facts. Before we conclude that government officials have undertaken such representation in litigation, we must be faced with a pleading in which this posture is clearly assumed" (*id.* at 242a-243a). Such was not the case here.

As the court of appeals explained, in *Orr Ditch*, "[n]either the court nor the government nor the Tribe or TCID was ever put on notice that a binding judgment was intended between TCID and the Tribe. Such notice might have suggested to the Tribe that it must seek to intervene, and to the court that intervention might be proper" (Pet. App. 259a, citing *State of New Mexico* v. *Aamodt*, 537 F.2d 1102, 1106 (10th Cir. 1976), cert. denied, 429 U.S. 1121 (1977)). The result reached below also is consistent with the view that where, as here, efforts are made to bind non-parties to the former judgment, the courts will examine the actual configuration of interests of the non-parties to those of the former litigants, and, additionally, examine how much effective control the non-parties had over that litigant. See *Restatement (Second) of the Law of Judgments* § 37, and comments a, e and f (1982); *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 592 & n.30, 593-

594 (1974); see generally *Gerrard* v. *Larsen*, 517 F.2d 1127, 1133-1135 (8th Cir. 1975).[18]

c. The result reached by the court of appeals in this case does not establish broad precedent for water adjudications generally. It does not disturb the res judicata effect of decrees in such suits as between the parties. Thus, as Judge Schroeder observed in dissent (Pet. App. 252a), the holding below would not control where the project water users *were* named parties in the water adjudication, as in the *Kent* decree (*Hurley* v. *Abbott*, No. 4564 Decree (3d Jud. Dist. Maricopa Co., Ariz. 1910) (see Pet. App. 252a n.1)), or the *Alpine* case, involving the adjudication of rights on the Truckee River. In the instant case, moreover, the fishery claim being advanced is for a use to which river water and the Reservation had been put from time immemorial and to which it was being put at the time of the decree in *Orr Ditch*. No effort is made to reopen a decree to devote water to new uses, or to seek additional water for a purpose—Indian irrigation—for which rights were specifically decreed in *Orr Ditch*. It should be clear that the res judicata ruling below will have virtually no preceden-

[18] The circumstances of this case also fully distinguish the cases upon which TCID relies in contending (81-2276 Pet. 13-17) that the decision below conflicts with decisions of other circuits. In three of these cases—*National Bondholders Corp.* v. *Seaboard Citizens National Bank*, 110 F.2d 138 (4th Cir. 1940); *Livesay Industries, Inc.* v. *Livesay Window Co.*, 202 F.2d 378 (5th Cir. 1953), cert. denied, 346 U.S. 855 (1953); and *Scooper Dooper, Inc.* v. *Kraftco Corp.*, 494 F.2d 840 (3d Cir. 1974)—the co-interests in the prior proceeding appeared openly as separate co-parties, and the claim that was later barred was openly litigated and determined as a necessary element of the first suit. Such is not the case here. In the fourth case cited by TCID, *Diamond Shamrock Corp.* v. *Lumbermens Mutual Casualty Co.*, 416 F.2d 707 (7th Cir. 1969), no prior proceeding had been completed. The issue therefore was not the res judicata effect of a prior judgment, but the joinder as co-plaintiffs of an insured and its fire insurer against the insured's boiler and machinery insurer to ascertain under whose policy the loss was covered. The Seventh Circuit held that the co-plaintiffs were properly joined and would be mutually bound by any judgment regarding insurance coverage.

tial impact for an additional reason as well: in no other case to our knowledge has the United States acted with regard to Indians as it did in the *Orr Ditch* proceedings, thereby occasioning a subsequent reexamination by the Executive and the courts of the trust obligation of the United States with respect to the rights asserted. Moreover, in current water adjudications involving Indian interests, unlike that in *Orr Ditch*, the affected tribe itself typically intervenes in the case as a party or plays an active role, through its attorneys, in developing the government's case. Thus, the problems presented by the instant case cannot be expected to arise in the future so as to render the interlocutory decision below one of broad importance warranting review.[19]

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[19] Relying on the Ninth Circuit's own previous decisions in *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), cert. denied, 352 U.S. 988 (1957), and 330 F.2d 897 (9th Cir. 1964), cert. denied, 381 U.S. 924 (1965), petitioner TCID argues (81-2276 Pet. 24-29) that the fishery claim was in any event extinguished by the Truckee River Agreement entered into by the Secretary in 1936, even if assertion of that claim is not barred by res judicata. This fact-bound issue does not warrant review. The agreement does not on it face mention a fishery water right, and there has been no interpretation of the agreement by the courts below that it was in fact intended to extinguish a fishing right. Moreover, the court of appeals read this Court's decision in *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 63 (1962), to have overruled its previous *Ahtanum* decisions concerning the Secretary's authority under 25 U.S.C. 2 and 9 to enter into such an agreement. But even if the court of appeals erred regarding the continuing validity of its own prior precedents, an intra-circuit conflict does not warrant review, especially in the interlocutory posture of this case. This argument, like the res judicata argument, will be available to petitioners on review of a final judgment if the courts below ultimately determine that there is a reserved right for fishery purposes and quantify that right in a way that substantially affects petitioners' interests. Review of this question therefore is inappropriate at this time.

CONCLUSION

The petitions for a writ of certiorari should be denied.[20]

Respectfully submitted.

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AUGUST 1982

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[20] We do not separately address the contentions in the Tribe's conditional cross-petition for a writ of certiorari, No. 82-38, for if, as we urge, the Court denies the instant petitions, it follows that the Tribe's conditional cross-petition should be denied as well.

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ALEXANDER STEVAS,

No. 81-2276

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

TRUCKEE-CARSON IRRIGATION DISTRICT,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

STATEMENT OF RESPONDENT STATE OF NEVADA

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QUESTIONS PRESENTED

Respondent State of Nevada adopts the "Questions Presented" as set forth by the Petitioner.

IN THE

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TRUCKEE-CARSON IRRIGATION DISTRICT,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

STATEMENT OF RESPONDENT STATE OF NEVADA

OPINIONS BELOW, JURISDICTION AND STATUTORY PROVISIONS INVOLVED

Respondent State of Nevada adopts the statements of Petitioner in regard to the "Opinions Below," "Jurisdiction" and "Statutory Provision Involved," except that Petitioner has failed, pursuant to Rule 19.6 of the Rules of this Court, to name the State of Nevada as a Respondent. Since the State of Nevada was a party to the proceeding in the court whose judgment is sought to be reviewed, has an interest in the outcome of the case, and has filed a separate Petition for a Writ of Certiorari (No. 81-2245), it is technically a Respondent in the instant case.*

STATEMENT

Respondent State of Nevada has filed a separate Petition for a Writ of Certiorari entitled, *State of Nevada* v. *United States of America, et al.*, No. 81-2245, seeking

* Respondent State of Nevada received service of the Petition on June 11, 1982.

review of the same decision of the United States Court of Appeals for the Ninth Circuit as does the Petitioner in the instant case and for essentially the same reasons. Respondent State of Nevada submits that the two Petitions complement rather than duplicate each other, and therefore urges that both Petitions be granted. In that way, through briefing and oral argument, the Court will receive a full and complete exposition of the issues, facts and law that are of such fundamental importance to the Western States of this country.

Respectfully submitted,

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No. 81-2276

In the Supreme Court

OF THE

United States

OCTOBER TERM 1982

TRUCKEE-CARSON IRRIGATION DISTRICT,
Petitioner,

VS.

UNITED STATES OF AMERICA and
PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I INTRODUCTION

In its petition for certiorari petitioner Truckee-Carson Irrigation District ("TCID") argued that the decision below warrants review because it presents important issues concerning the preclusionary bar of *res judicata*, has potentially far-reaching impact on water rights in the West, both under adjudication decrees and water right settlement agreements, and is wrong. Sixteen states either filed their own petitions to have the decision reviewed, or filed briefs supporting TCID's petition for review.

Respondents United States and the Pyramid Lake Paiute Tribe of Indians ("Tribe") have filed separate briefs which oppose the granting of a writ because, they argue:

A. The situation presented by this case is unique and therefore the decision below will have little precedential value.

B. The decision below does not depart from established principles of preclusion, and

C. Review is premature.

Each of these contentions is incorrect and will be addressed in turn.

II ARGUMENT

A. Contrary to Respondents' Contentions, the Orr Ditch Situation is not Unique.

Respondents have both argued that review of the decision below is unwarranted because the situation which gave rise to the dispute is unique and not likely to recur. (U.S. Brief, p. 24, Tribe's Brief, p. 17.) These assertions are not founded in reality. Proof of this can be found as readily as reading the supporting brief of *amicus curiae* State of New Mexico, which identifies three pending cases in which tribes have not intervened and the United States is advancing competing water claims. (New Mex. Brief, p. 1.) In such cases, the reser-

vation water right could be relitigated in the future based on the principles established by the Ninth Circuit in the instant case. Additionally, in *Arizona* v. *California*, No. 8, Original, now pending before this Court, one of the contentions is that the United States could not have adequately represented the five Indian tribes' competing water claims in the earlier proceedings.[1]

It must be remembered that at the time of the original *Orr Ditch* litigation the federal attorneys acted in good faith and advanced as large a right as possible on behalf of the Reservation. (A-100.) It is only now, with the twenty-twenty hindsight provided by recent court decisions, that an issue can be identified on which evidence might have been presented in the prior case.

The vastness of the United States' land holdings in the west, the myriad purposes for which the government holds such lands, and the same inability to foretell the future which afflicted the *Orr Ditch* attorneys, simply preclude any realistic assertion that the *Orr Ditch* situation is unique and will never recur.

B. The Requirement of Pleading Adversity in a Comprehensive Water Right Adjudication Will Foster Uncertainty and Relitigation.

While respondents' claims of the singularity of the Truckee River situation are unfounded, there is one unique, though recurring, aspect of the situation. Forming the center of the controversy is the tension which results from the government's necessary representation of multiple claims in a com-

---

[1] That the Court retained jurisdiction in that case is merely a fortuitous circumstance. The multiple federal representation of competing claims therein, and the fact that irrigable lands were omitted from the claims previously advanced by the United States on behalf of the tribes, belies the United States' assertion that the *Orr Ditch* case is unique.

prehensive adjudication, juxtaposed against the formalistic edicts of traditional *res judicata*. The broad spectrum of the government's responsibilities requires a more practical application of *res judicata* principles than that adopted by the Ninth Circuit decision below.

Traditional *res judicata*, of which collateral estoppel is one branch, has historically required the existence of formal adversity in prior litigation between the party later asserting preclusion and the party against whom it is asserted.[2] Practical considerations of judicial economy and fairness, however, have prompted the courts to reexamine the necessity and productiveness of this technical requirement, and to reject it as a prerequisite of preclusion where issues have been actually litigated in an adversary context.

The same analysis applies to claim preclusion, as the Ninth Circuit recognized in its decision below when it extended the protection of claim preclusion to subsequent appropriators who were strangers to the *Orr Ditch* litigation. (A-50.) As the court noted, because of the comprehensive nature of the adjudication and the adversity between the plaintiff and the defendants, "it could be justly supposed that the parties would assert *all* their claims and defenses." (A-49; emphasis added), and that under such circumstances it would be "manifestly unjust" not to accord the non-party subsequent appropriators the preclusionary benefits of *res judicata*. (A-50.) It is both logically and precedentially inconsistent then, not to accord TCID the benefit of its application as well. As the Third

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[2]Collateral estoppel and *res judicata* are principally distinguished by the fact that collateral estoppel bars relitigation only of issues previously litigated and *res judicata* bars claims which might have been, but were not, for whatever reason, litigated. But in *Orr Ditch*, the Tribe's Winters doctrine cause of action *was actually litigated* in an adversary proceeding. (See A-49, A-50, A-104).

Circuit Court of Appeals held in *Scooper-Dooper Inc.* v. *Kraftco*, 494 F.2d 840, 845 (1974), "we see no reason to treat a co-plaintiff more harshly than a total stranger." (*See also* cases cited in TCID Pet. pp. 13-17.)

The reasons for abolishing the requirement of formal pleading adversity go far beyond the practical concern of judicial economy in cases in which the United States has necessarily litigated multiple claims in a comprehensive adjudication.[3] Although formal adversity presents a technical, but not insurmountable, hurdle for most parties who assert claim preclusion as a defense, the same cannot be said in suits such as the instant case. Where the United States asserts water rights in its multiple capacities, creation of the formal adversity required by the Ninth Circuit in its decision below may simply be unattainable. Indian tribes, as sovereigns, are immune from suit and thus *cannot be joined* in a comprehensive water adjudication without their consent. Certainly, therefore, such formal adversity is not within the power of the United States or any other party to create. Under the Ninth Circuit's ruling, such formal adversity is solely within the control of the Indian tribes themselves — a fact which makes sham of the principle that the United States controls litigation of Indian claims (*Pueblo of Picuris* v. *Abeyta*, 50 F.2d 12 (10th Cir. 1931)), and erodes the entire concept of government-Indian ward guardianship.

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[3]Significantly, the court below correctly noted that "any other conclusion [than that non-party subsequent appropriators are entitled to the benefits of claim preclusion] would make it impossible ever to quantify a reserved water right." (A-50).

As a result of tribal sovereign immunity and the Ninth Circuit ruling below, the government will simply be unable to achieve finality in either its proprietary or Indian water rights.[4] The certainty of water rights, on which valid planning decisions in both the public and private sector must be based, becomes a mirage.

While collateral estoppel might seem to afford some degree of finality as to issues actually litigated, such protection is undependable at best. First, the requirement of formal adversity has not been abandoned in all circuits, and in such circuits, even issue preclusion may be unavailable. Second, as illustrated by this case, recent cases (*Arizona* vs. *California*, 373 U.S. 546, 601 (1963); *Cappaert* v. *United States*, 426 U.S. 128 (1976); *(United States* v. *New Mexico*, 438 U.S. 696 (1978)), and others now pending in the courts (*see e.g., Coleville Conferderated Tribes* v. *Walton*, 647 F.2d 42 (9th Cir. 1981); *United States* v. *Adair*, 478 F. Supp. 336 (D.Ore. 1979)), reserved water right concepts are still emerging, with the consequence that new and previously unforeseen issues which can serve as the basis for relitigation, are constantly evolving.

The case at bench illustrates that point. The government attorneys in *Orr Ditch* represented the Tribe's interest properly and in good faith and intended, as did all concerned, that the final decree be a final comprehensive adjudication of all

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[4]The Ninth Circuit has recently foreclosed the only other avenue for obtaining final comprehensive water right adjudications by ruling that states, under their admissions acts and their constitutions, lack subject matter jurisdiction to adjudicate Indian water rights, even in statutory adjudications to which the United States has consented pursuant to the McCarran Act. *(Northern Cheyenne Tribe* v. *Adsit*, 668 F.2d 1080 (9th Cir. 1982), *petition for cert. filed*, 50 U.S.L.W. 3965 (U.S. May 21, 1982) (No. 81-2188), and *San Carlos Apache Tribe* v. *Arizona*, 668 F.2d 1093 (9th Cir. 1982), *petition for cert. filed*, 50 U.S.L.W. 3949 (U.S. May 5, 1982) (No. 81-2147).)

rights, including the reserved right of the Pyramid Lake Reservation, on the Truckee River. (A-100.) But subsequent judicial decisions further defining the *scope* of federal reserved water rights have uncovered new "issues" which, if accepted as such, preclude application of collateral estoppel and thus defeat the finality of the prior decree.

More than simply permitting inconclusive judgments involving federal water rights the Ninth Circuit decision actually *encourages* them. If, as the court below has held, a tribe cannot be bound by a judgment in an action in which the government represented both trust and proprietary interests, there is certainly little incentive for the tribe voluntarily to intervene in the action. By foregoing intervention, a tribe preserves its right later to challenge the outcome of the case if it subsequently becomes advantageous to do so. The decision below, by erecting a technical formal adversity requirement as a barrier to application of *res judicata*, thus gives Indian tribes *two* opportunities to litigate their claims, as opposed to the single opportunity afforded others.

C. Review of the Decision Below Should Not Be Deferred.

Respondents have argued that review of the ruling below at this time is premature, since further proceedings in this and other cases may result in accommodation of the water needs of the Tribe and the petitioners. Such an argument, however, ignores the fact that the ultimate decision concerning apportionment of Truckee River water rights will not and cannot affect the impact of the present ruling as *stare decisis* on important *res judicata* and due process issues.

Postponement of review of the lower court's decision for the four to five years required for a trial, decision, and appeal on the balance of the case will only continue the unwarranted vitality and precedential value of the decision below. The issues will not be further developed in the course of the action;

they are now as sharply focused as they ever will be. Indeed, if, as respondents contend, a water allocation accommodation can be achieved between the parties, the impact of the decision below on the instant parties will be blunted, and the subsequent presentation for review of the important issues involved may suffer as a result. The precedential value of the decision, however, would be unaffected.

Both respondents have attempted to characterize this litigation as an inseparable part of a larger coordinated effort to solve the water problems of the Truckee River users and the Pyramid Lake Tribe. The government has implied and the Tribe has expressly contended that review by this Court at this time may somehow jeopardize the effectiveness of those other efforts. (U.S. Brief, p. 18; Tribe's Brief, p.19.) Nothing could be less true. Each of the other cases described by the respondents (U.S. Brief, p. 4, n. 6; pp. 6-8, n.8; Tribe's Brief, pp. 4-8) challenges the entitlement of upstream water users to the amounts they have claimed and diverted. These challenges rest not upon any claimed water right for the Pyramid Lake Reservation but, rather, on the alleged lack of right of the upstream diverters.[5] *None* of the rights asserted by respond-

[5]The Tribe repeatedly alludes to "wasteful practices" and "unnecessary diversions" in referring to the use of water by TCID's farmers on the Newlands Project citing *Pyramid Lake Paiute Tribe of Indians* v. *Morton*, 354 F.Supp. 252 (D.D.C. 1973). (E.g., Tribe's Brief, p. 5.) TCID was not a party to that case and, predictably, the Tribe's unopposed assertions concerning TCID's "wasteful use of water" were accepted by that court as true. By contrast, in *United States* v. *Alpine Land and Reservoir Co.*, 503 F.Supp. 877 (D.Nev. 1980) appeal pending, Nos. 81-4084, 81-4116 (9th Cir.) to which TCID *was* a party, and in which the reasonableness of TCID's water practices was the principal issue, the Court found that TCID's use of water was reasonable and economical. The reasonable water duty found by the Court in *Alpine* was 3.5 acre-feet per acre for bottomlands and 4.5 acre-feet per acre for benchlands, the same water duty decreed in *Orr Ditch* and agreed to in the Truckee River Agreement.

By contrast, the reasonable water duty of the reservation lands was determined by the Special Master in *Orr Ditch* to be 3.3 and 4.1 acre-feet per acre applied to the land for bottomlands and benchlands, respectively. But the United States insisted that the Truckee River Agreement and *Orr Ditch* Final Decree provide for even *more* water for the Tribe, and succeeded in securing a reservation right to 4.1 and 4.7 acre-feet applied per acre for bottom and benchlands, respectively.

ents in any of the related cases is dependent on or will be affected by the outcome of the controversy in the litigation before this Court. Nor, conversely, will the outcome of this case affect the courts' determinations in any of the other cases now pending.

The only conceivable impact of this Court's decision to review or not to review the decision below is that, in related out-of-court water settlement negotiations, one party or the other may lose negotiating leverage. (Tribe's Brief, p. 19). This is not a proper consideration in deciding whether the ruling below should be reviewed. But, even if such a consideration were appropriate, to the extent that the negotiating leverage of a party rests on an incorrect court decision below, it represents an unfair advantage which should be and can be alleviated by a prompt ruling by this Court. Furthermore, there is every reason to believe that the certainty which will result from this Court's review of the issues presented here will encourage rather than discourage negotiated settlement, since all parties will then be better able to ascertain the strength and reliability of their claims of right and to adjust their negotiating positions accordingly.

Deferral of review of the lower court's decision will perpetuate the unnecessary unsettling of water and property rights throughout the West and the economic and human hardships which inevitably accompany such uncertainty. As stated in the petitions of both TCID and the State of Nevada, and as attested to by the supporting amicus curiae briefs from virtually all of the states west of the Mississippi River, the issues presented are important enough and potentially disruptive enough to warrant review by this Court without further delay.

III CONCLUSION

For the reasons stated in the petition and herein, petitioner prays that a writ of certiorari issue from this Court.

Dated: September 10, 1982.

Respectfully submitted,

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No. 81-2276-CFX
Status: GRANTED

Title: Truckee-Carson Irrigation District, Petitioner
v.
United States, et al.

Docketed:
June 9, 1982

Court: United States Court of Appeals
for the Ninth Circuit

Vide:
81-2245
82-38

Counsel for petitioner: Girard, Frederick G.

Counsel for respondent: Solicitor General, Pelcyger, Robert S., Prettyman Jr., E. Barrett, Elliott, Steven P., Blakey, Richard W.

Entry	Date	Note	Proceedings and Orders
1	Jun 9 1982	G	Petition for writ of certiorari filed.
2	Jun 29 1982		Brief of the State of Nevada in support of certiorari filed.
4	Jun 30 1982		Order extending time to file response to petition until August 10, 1982.
5	Jul 9 1982		Brief amicus curiae of California et al filed. VIDED.
7	Jul 9 1982		Order extending time to file response to petition until August 10, 1982.
8	Aug 10 1982		Brief of respondent Pyramid Lake Paiute Tribe in opposition filed. VIDED.
9	Aug 11 1982		Brief of respondent in opposition filed.
10	Aug 10 1982		Brief amicus curiae of State of Arizona filed.
11	Sep 15 1982		Reply brief of petitioner Truckee-Carson Irrigation District filed.
12	Sep 1 1982		DISTRIBUTED. September 27, 1982
15	Oct 4 1982		REDISTRIBUTED. October 8, 1982
16	Oct 12 1982		Petition GRANTED. This case is consolidated with Nos. 81-2245 and 82-38 and a total of one hour is allotted for oral argument.
			**********
17	Nov 3 1982		Order extending time to file joint appendix and petitioner's brief on the merits until December 16, 1982.
18	Nov 5 1982	G	Motion of petitioners for divided argument filed.
19	Nov 15 1982		Motion of petitioners for divided argument GRANTED.
20	Dec 16 1982		Brief amicus curiae of State of New Mexico filed. VIDED.
21	Dec 16 1982		Brief of petitioner Truckee-Carson Dist. filed.
22	Dec 16 1982		Joint appendix filed. VIDED.
23	Dec 18 1982		Brief of respondent Pyramid Lake Paiute Tribe filed. VIDED.
24	Dec 18 1982		Brief amicus curiae of Yakima Valley Canal Co., et al filed.
25	Dec 20 1982		Brief amicus curiae of State of Washington & State of Idaho filed.
26	Dec 16 1982		Brief amicus curiae of Alabama, et al. filed. VIDED.
27	Dec 16 1982		Brief amicus curiae of Arizona, et al. filed. VIDED.
28	Dec 21 1982		Brief amicus curiae of Salt River Project Agricultural Improvement Assoc. etc. filed. VIDED.
29	Jan 6 1983	G	Motion of the Solicitor General for divided argument filed.
30	Jan 17 1983		Motion of the Solicitor General for divided argument

No. 81-2276-CFX

Entry	Date	Note	Proceedings and Orders
			GRANTED.
32	Jan 14 1983		Order extending time to file brief of respondent on the merits until February 11, 1983.
33	Jan 14 1983		Brief amicus curiae of City of Los Angeles, et al., filed. VIDED.
34	Jan 5 1983		Record filed.
35	Jan 5 1983		Certified original record & C.A. proceedings, 22 boxes received. 2nd additional box received Jan. 6, 1983.
36	Feb 8 1983		Order further extending time to file brief of respondent on the merits until February 25, 1983.
37	Feb 14 1983		Brief amicus curiae of Sierra Club, et al. filed. VIDED.
38	Feb 28 1983		Brief of respondent Pyramid Lake Paiute Tribe filed. VIDED.
39	Feb 28 1983		Brief of respondent Sierra Pacific Power Co. filed. VIDED.
40	Feb 28 1983		Brief amicus curiae of Hoopa Valley Tribe, et al. filed. VIDED.
41	Mar 2 1983		Brief of respondents United States, et al. filed. VIDED.
42	Mar 10 1983		CIRCULATED.
43	Mar 24 1983		SET FOR ARGUMENT. Wednesday, April 27, 1983. (4th case) The case is consolidated with case Nos. 81-2245 & 82-38.
44	Apr 8 1983	X	Reply brief of petitioner State of Nevada filed. VIDED.
45	Apr 19 1983	X	Reply brief of petitioner Truckee-Carson Dist. filed.
46	Apr 23 1983	G	Motion of Pyramid Lake Paiute Tribe of Indians for leave to file reply brief out-of-time filed.
47	Apr 25 1983		DISTRIBUTED. April 29, 1983. (Motion for leave to file reply brief out-of-time.)
48	Apr 27 1983		ARGUED.
49	May 2 1983		Motion of Pyramid Lake Paiute Tribe of Indians for leave to file reply brief out-of-time GRANTED.